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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

THOMAS FRANCIS ALLEN . . . APPELLANT;

AND

WILLIAM CRIDGE FLOOD AND WALTER TAYLOR . . . . . RESPONDENTS.

H. L. (E.)
1897
Dec. 14.

Followed. D. C. THOMSON LD. *v.* DEAKIN [1952] 1 Ch. 646

Action, Cause of—Maliciously inducing Employer to discharge Servant and not to employ Servant—Interference with Trade—Malice—Intent to Injure—Motive.

An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

Discussion of the cases in which evil motive is said to be an essential ingredient in a civil cause of action, such as malicious prosecution: see per Lord Watson, Lord Herschell, and Lord Davey, at pp. 92, 93, 125, 126, 173.

The respondents were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the ironwork of the ship objected to the respondents being employed, on the ground that the respondents had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The appellant, who was a delegate of the union, was sent for by the ironworkers and informed that they intended to leave off working. The appellant informed the employers that unless the respondents were discharged all the ironworkers would be called out or knock off work (it was doubtful which expression was used); that the employers had no option; that the iron-men were doing their best to put

H. L. (E.)
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an end to the practice of shipwrights doing ironwork and that wherever the respondents were employed the iron-men would cease work. There was evidence that this was done to punish the respondents for what they had done in the past. The employers, in fear of this threat being carried out which (as they knew) would have stopped their business, discharged the respondents and refused to employ them again. In the ordinary course the respondents' employment would have continued. The respondents having brought an action against the appellant, the jury found that he had maliciously induced the employers to discharge the respondents and not to engage them, and gave the respondents a verdict for damages:—

Held, reversing the decision of the Court of Appeal, [1895] 2 Q. B. 21 (Lord Halsbury L.C. and Lords Ashbourne and Morris dissenting), that the appellant had violated no legal right of the respondents, done no unlawful act, and used no unlawful means, in procuring the respondents' dismissal; that his conduct was therefore not actionable however malicious or bad his motive might be, and that notwithstanding the verdict the appellant was entitled to judgment.

Carrington v. *Taylor*, (1809) 11 East, 571, overruled, and *Keeble* v. *Hickeringill*, (1706) 11 East, 574, n.; *Lumley* v. *Gye*, (1853) 2 E. & B. 216; *Bowen* v. *Hall*, (1881) 6 Q. B. D. 333, and *Temperton* v. *Russell*, [1893] 1 Q. B. 715, commented on.

THE facts material to this appeal (omitting matters not now in question) were as follows: In April 1894 about forty boiler-makers, or "iron-men," were employed by the Glengall Iron Company in repairing a ship at the company's Regent Dock in Millwall. They were members of the boiler-makers' society, a trade union, which objected to the employment of shipwrights on ironwork. On April 12 the respondents Flood and Taylor, who were shipwrights, were engaged by the company in repairing the woodwork of the same ship, but were not doing ironwork. The boiler-makers, on discovering that the respondents had shortly before been employed by another firm (Mills & Knight) on the Thames in doing ironwork on a ship, became much excited and began to talk of leaving their employment. One of them, Elliott, telegraphed for the appellant Allen, the London delegate of the boiler-makers' society. Allen came up on the 13th, and being told by Elliott that the iron-men, or some of them, would leave at dinner-time, replied that if they took the law into their own hands he would use his influence with the council of the society that they should be deprived of all benefit from the society and be fined, and that they must wait and see how things settled. Allen then had an interview

with Halkett, the Glengall Company's manager, and Edmonds the foreman, and the result was that the respondents were discharged at the end of the day by Halkett. An action was then brought by the respondents against Allen for maliciously and wrongfully and with intent to injure the plaintiffs procuring and inducing the Glengall Company to break their contract with the plaintiffs and not to enter into new contracts with them, and also maliciously, &c., intimidating and coercing the plaintiffs to break, &c., and also unlawfully and maliciously conspiring with others to do the above acts.

At the trial before Kennedy J. and a common jury Halkett and Edmonds were called for the plaintiffs, and gave their account of the interview with Allen. In substance it was this (1): Allen told them that he had been sent for because Flood and Taylor were known to have done ironwork in Mills & Knight's yard, and that unless Flood and Taylor were discharged all the members of the boiler-makers' society would be "called out" or "knock off" work that day: they could not be sure which expression was used; that Halkett had no option; that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork, and wherever these men were employed, or other shipwrights who had done ironwork, the boiler-makers would cease work—in every yard on the Thames. Halkett said that if the boiler-makers (about 100 in all were employed) had been called out it would have stopped the company's business, and that in fear of the threat being carried out he told Edmonds to discharge Flood and Taylor that day, and that if he knew of any shipwrights having worked on ironwork elsewhere, when he was engaging men, for the sake of peace and quietness for themselves he was not to employ them. Allen was called for the defence. His account of the interview is discussed in the judgment of Lord Halsbury L.C.

Kennedy J. ruled that there was no evidence of conspiracy, or of intimidation or coercion, or of breach of contract, Flood and Taylor having been engaged on the terms that they might be discharged at any time. In the ordinary course

(1) Part of the evidence is given verbatim in the judgment of Lord Halsbury L.C.

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their employment would have continued till the repairs were finished or the work slackened.

In reply to questions put by Kennedy J. the jury found that Allen maliciously induced the Glengall Company (1.) to discharge Flood and Taylor from their employment; (2.) not to engage them; that each plaintiff had suffered 20*l.* damages; and that the settlement of the dispute was a matter within Allen's discretion. After consideration Kennedy J. entered judgment for the plaintiffs for 40*l.* This decision was affirmed by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.). (1) Against these decisions Allen brought the present appeal. It was argued first before Lord Halsbury L.C. and Lords Watson, Herschell, Macnaghten, Morris, Shand, and Davey on December 10, 12, 16, 17, 1895, and again (the following judges having been summoned to attend—Hawkins, Mathew, Cave, North, Wills, Grantham, Lawrance and Wright JJ.) on March 25, 26, 29, 30, April 1, 2, 1897 before the same noble and learned Lords, with the addition of Lords Ashbourne, and James of Hereford.

Cohen Q.C. and *Robson Q.C.* (*E. Morten* with them) for the appellant. To maintain the action it must be shewn that the appellant did some unlawful act. The Court of Appeal went upon the ground that a lawful act may be made unlawful and actionable by a malicious motive. This error is at the root of this decision and of many dicta scattered through the cases. But it is not supported by decision—not even by that of *Temperton* v. *Russell*. (2) In all the cases where an action of tort has been held to lie the defendant has used some unlawful means or done some act unlawful in itself, without reference to motive. What is there unlawful in telling an employer that if he continues to employ A., B. will leave his service? It is said that A. has a right to employment. What he has a right to is to make a contract of employment if the employer desires it. He has no absolute right to any particular employment, irrespective of circumstances. He has a right to sell his labour—but only to one who wishes to buy it. If the principle of the

(1) [1895] 2 Q. B. 21. (2) [1893] 1 Q. B. 715.

Court of Appeal be sound a butler, who having quarrelled with a fellow-servant tells his master that he must leave his service unless the fellow-servant is discharged, is liable to an action if the master yields to the threat and discharges the fellow-servant; and an action will lie against any person who for reasons of his own persuades a customer to leave a tradesman. The appellant used no unlawful means and did not induce the Glengall Company to commit any unlawful act—such as a breach of contract. It is not necessary therefore to dispute the decisions in *Lumley* v. *Gye* (1) and *Bowen* v. *Hall* (2), though if it were necessary much might be urged against their validity. No right of the respondents was violated: taking a view of the evidence of the plaintiffs' witnesses the most unfavourable to the appellant, he made a representation to the employers of what would happen—at all events of what he believed would happen—if the respondents were retained. This is not obstruction or disturbance of any right: it is not the procurement of the violation of any right.

The reasoning of the Court of Appeal is not consistent with authority. Rigby L.J. assumes that the act done by the appellant was in itself legal, but, as it was done to injure the plaintiffs, was rendered unlawful by the motive. But he gives no reason for that opinion, which is contrary to the decision of this House in *Bradford Corporation* v. *Pickles* (3), (and see Lord Watson's view as to the law of Scotland as expressed in that case). Rigby L.J. thought himself bound by *Temperton* v. *Russell* (4); but that case gives him no support. The views expressed by Lopes L.J. (5) differ entirely from what he himself laid down in *Temperton* v. *Russell* (4), and from the judgment of Erle C.J. in *Lumley* v. *Gye*. (1) Erle C.J. stated the law to be that the person who procures the breaking of a contract, to benefit himself or injure another, is guilty of an actionable wrong, and that is the basis of Lopes L.J.'s decision in *Temperton* v. *Russell*. (4) He said below, "that when a person wilfully does an act to the injury of another, without any lawful cause, that is evidence of malice." No

(1) 2 E. & B. 216.
(2) 6 Q. B. D. 333.
(3) [1895] A. C. 587.
(4) [1893] 1 Q. B. 715.
(5) [1895] 2 Q. B. 40.

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doubt he meant to add, "which occasions loss or damage"; but even so the proposition is unsound. There are, it is true, cases in which the presence of malice gives a right of action which would not otherwise arise; but this is not one of them. Where that is the case it is on account of some "policy of the law," as in cases of libel, slander, and malicious prosecution; even a "lawful excuse" such as privilege may be taken away if there be actual malice. In malicious prosecution—as to which our law is peculiar—if there is reasonable and probable cause and no malice, an action will not lie. Speaking generally, a true statement, however malicious, gives no right of action. Thus Lopes L.J.'s proposition is too wide, and would embrace cases in which certainly no action would be sustainable. For example, if a person knows that A. intends to leave a legacy to B., and induces him not to do so, without making any false statement, which of course would be a tort, there could be no action. So if a man induces another, even by payment of money, to leave one tradesman and go to another, there is no legal wrong. The Lord Justice asks, "Was there any lawful excuse?" and then goes on to observe that the appellant might have withdrawn all the boiler-makers. If so, why should he not warn the masters? If any suggestion is now made of coercion, the answer is that at the trial there was no evidence of coercion, and no such question was left to the jury: it is too late now to raise a new cause of action. There was no wrong in warning the employers—indeed it was a moral duty to do so. There is no tort in a threat except of violence or of injury to property. A threat, to give rise to a cause of action, must be equivalent to assault; and an agreement is not voidable for anything short of duress. In any case the threat must itself be a wrong giving rise to a civil action. The judgment of the Master of the Rolls is open to the like criticism. *Temperton* v. *Russell* (1) was founded on a mistaken view of *Ashby* v. *White*. (2) But it is not necessary to impugn the actual decision in either *Temperton* v. *Russell* (1) or *Bowen* v. *Hall*. (3) *Temperton* v. *Russell* (1) was based partly on conspiracy, which is not the case here. Neither *Bowen* v. *Hall* (3) nor *Lumley* v.

(1) [1893] 1 Q. B. 715.
(2) (1703) 1 Sm. L. C. 231; 2 Ld. Raym. 938; 3 Ld. Raym. 320.
(3) 6 Q. B. D. 333.

Gye (1), on which it is based, touches the present case. They both apply entirely to existing obligations and rest altogether on wrongful acts apart from motive. The respondents had no right to be employed, and no vested right was infringed. The person who discharged the respondents was the employer, whose act, therefore, and not the suggestion of the appellant, was the proximate cause of the damage. A desire to benefit oneself at the expense of another does not make an inducement offered to a third person an actionable wrong. It is what every commercial traveller does. Motive cannot make that actionable which would not be so without it; and the basis of Lord Esher's judgment is in the teeth of *Bradford Corporation* v. *Pickles* (2), and per Parke B. in *Stevenson* v. *Newnham* (3): "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." In *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (4) Lord Esher M.R. cites Holt C.J.'s decision in *Savile* v. *Roberts* (5) as to the causes of damage which will support an action for malicious prosecution. To damage occasioned to a man's person or liberty and expense Holt C.J. adds damage to fame and credit. None of these exist here. In *Abrath* v. *North Eastern Ry. Co.* (6) Lord Bramwell discusses malice and the erroneous notions entertained about it. In *Keeble* v. *Hickeringill* (7)—the decoy case—Holt C.J.'s proposition and decision are manifestly too wide and inconsistent with *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (8) In the other decoy case, *Carrington* v. *Taylor* (9), no reasons are given. The mere hindering of a man in his employment is not actionable: *Hannam* v. *Mockett* (10), where it was held that no legal wrong was done by shooting near the plaintiff's trees to drive away the rooks. *Read* v. *Edwards* (11), the case of a mischievous dog hunting game, *Green* v. *London General Omnibus Co.* (12), and

(1) 2 E. & B. 216.
(2) [1895] A. C. 587.
(3) (1853) 13 C. B. 285, 297.
(4) (1883) 11 Q. B. D. 674, 685.
(5) (1698) 1 Ld. Raym. 374.
(6) (1886) 11 App. Cas. 247, 251.
(7) 11 East, 574, n.; 11 Mod. 74, 130.
(8) (1889) 23 Q. B. D. 598; [1892] A. C. 25.
(9) 11 East, 571.
(10) (1824) 2 B. & C. 934.
(11) (1864) 34 L. J. (C.P.) 31.
(12) (1859) 7 C. B. (N.S.) 290.

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Ibbotson v. *Peat* (1), cases of nuisance, are clearly distinguishable. *Clifford* v. *Brandon* (2) and *Gregory* v. *Duke of Brunswick* (3), cases of preconcerted hissing in a theatre, involved conspiracy, and have no application. It is not open to the respondents to make the charge of conspiracy at this stage. No right of the respondents has been infringed and no tort committed.

Lawson Walton Q.C. and *Rufus Isaacs* for the respondents. The decision of the Court of Appeal may be supported on two grounds. First, the appellant obstructed and interfered with the respondents' trade and means of livelihood. That is in itself an unlawful act. But, secondly, if it were lawful it would be made unlawful if done from a desire to punish the respondents or from any motive which imports malice. There was abundant evidence of this bad motive not only in the evidence given by Halkett and Edmonds but in the appellant's own shuffling and prevaricating account of himself and his interview with them. The respondents had a clear right to the employment: the Glengall Company desired to employ them. Wherever a right is infringed, and damage results, an action will lie unless the defendant can shew that he was exercising a right or discharging a duty. In *Bradford Corporation* v. *Pickles* (4) no right was infringed. This principle, which is of universal application, is illustrated in the case of libel, and of malicious prosecution. In both cases motive is of the essence; as for instance, where the criminal law is put in motion wrongfully for an indirect purpose, such as obtaining payment of a debt. There is no such distinction as the appellant seeks to establish between rights ex contractu and others. The old action on the case had no reference to contract, nor has the parents' right to sue for the seduction of an adult daughter. *Bowen* v. *Hall* (5) and *Lumley* v. *Gye* (6) are really in the same category as actions for malicious prosecution and libel. In both cases the motive was held to be the principal element in the cause of action. In *Lumley* v. *Gye* (6) it runs throughout

(1) (1865) 3 H. & C. 644.
(2) (1810) 2 Camp. 358.
(3) (1843–4) 6 Man. & G. 205, 953.
(4) [1895] A. C. 587.
(5) 6 Q. B. D. 333.
(6) 2 E. & B. 216.

the judgments of Erle C.J. and Crompton J., and the words constantly recur that the defendant "maliciously" induced, enticed, procured Miss Wagner to break her contract. The mere procurement to break a contract, or to interfere with a man's voting as in *Ashby* v. *White* (1), if the act was honestly done in the supposed discharge of duty, would not be actionable. So if a man in good faith advised a course which was afterwards held to be a breach of contract, no action would lie. But such cases are widely different from the present. A bad motive for doing an act not wrongful in itself will make it actionable: *Gibbs* v. *Pike*. (2) In the present case both elements are present: the interference with the right of the plaintiffs to obtain employment where they could was an unlawful act, and there was malice or an intention to injure the plaintiffs. Illustrations of similar illegal acts are the persuasion of a servant to leave his master with the knowledge that it will injure the master, and the inducement of a landlord to give a tenant notice, interfering with the tenant's right to occupy for trade purposes. The two decoy cases were instances of unlawful interference with trade. So in *Tarleton* v. *M'Gawley* (3), where firing at natives for the purpose of preventing their trading with the plaintiff was held actionable. In the *Mogul Case* (4) there was no interference with trade beyond legitimate competition; but the two decoy cases were throughout expressly approved by Bowen L.J. (5) and Fry L.J. (6); and by Lord Field. (7) Bowen L.J. says: "Intimidation, obstruction and molestation are forbidden: so is the intentional procurement of a violation of individual rights, contractual or other."

[LORD HERSCHELL. Is competition the only permissible form of interference? Is a temperance crusade unlawful?]

If the crusade were against a particular publican it would be unlawful. So if a priest refused the consolations of religion to individuals. In a large variety of cases the motive has been

(1) 1 Sm. L. C. 231; 2 Ld. Raym. 938; 3 Ld. Raym. 320.
(2) (1842) 9 M. & W. 351.
(3) (1794) 1 Peake, N. P. C. 270.
(4) [1892] A. C. 25.
(5) 23 Q. B. D. 614.
(6) 23 Q. B. D. 626.
(7) [1892] A. C. 51.

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held to be the determining factor. It was so in *Green* v. *London General Omnibus Co.* (1) It is constantly so in libel and slander, particularly when they injure trade: and actions not per se tortious have been held so on account of the motive, as in *Riding* v. *Smith* (2), where an imputation on the chastity of the plaintiff's wife was held a trade slander and actionable. So *Garret* v. *Taylor* (3); *Graves' Case* (4) and *Levet's Case* (4); *Western Counties Manure Co.* v. *Lawes' Chemical Manure Co.* (5), where false disparagement of another's goods was distinguished from excessive praise of one's own, the latter being the case in *Young* v. *Macrae.* (6) In *White* v. *Mellin* (7) the *Manure Company's Case* (5) was discussed. American cases which go to shew that the appellant's conduct was actionable and that it is unlawful to induce persons to leave employment or to dismiss servants are *Bixby* v. *Dunlap* (8) and *Walker* v. *Cronin.* (9)

As to threats, see *Reg.* v. *Druitt* (10); *O'Neill* v. *Longman* (11); *Reg.* v. *Tomlinson* (12); *Reg.* v. *Walton* (13); *Reg.* v. *Miard.* (14) *Gibson* v. *Lawson* (15) and *Curran* v. *Treleaven* (15) only affect the criminal law and leave civil remedies untouched. *Bromage* v. *Prosser* (16) shews the distinction between malice in fact and malice in law. Allen's evidence was untrustworthy and in fact a deliberate misrepresentation.

[They also referred to 6 Geo. 4 c. 129; 22 Vict. c. 34; 34 & 35 Vict. c. 31 s. 2, and c. 32; and 38 & 39 Vict. c. 86.]

Robson Q.C. in reply. Kennedy J. did not leave to the jury the question whether the appellant had been guilty of misrepresentation; and no such case was made against him. If the respondents intended to rest on false representation they should have pleaded that he "falsely and maliciously" induced the company to dismiss the men. The respondents confuse right

(1) 7 C. B. (N.S.) 290.
(2) (1876) 1 Ex. D. 91.
(3) (1620) Cro. Jac. 567.
(4) (1592) Cro. Eliz. 289.
(5) (1874) L. R. 9 Ex. 218.
(6) (1862) 3 B. & S. 264, 270.
(7) [1895] A. C. 154, 161.
(8) (1876) 22 Amer. Rep. 475.
(9) (1871) 107 Mass. 555.
(10) (1867) 10 Cox, C. C. 592.
(11) (1863) 4 B. & S. 376.
(12) [1895] 1 Q. B. 706.
(13) (1863) L. & C. 288.
(14) (1844) 1 Cox, C. C. 22.
(15) [1891] 2 Q. B. 545.
(16) (1825) 4 B. & C. 247.

and opportunity, and no right was violated. There is no authority that malice alone can give a right of action. On a recent occasion masters at Glasgow dismissed men belonging to a certain union for the purpose of exercising influence at Belfast, but in doing so they only asserted an undoubted right.

At the close of the arguments the following question was propounded to the judges: Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?

The judges desired time to consider, and on June 3, 1897, delivered the following opinions:—

HAWKINS J. My Lords, my answer to the question put to Her Majesty's judges is, "There was evidence of a cause of action fit to be left to the jury." In this opinion I have called the respondents "the plaintiffs," the appellant "the defendant," ignoring his co-defendants, who were discharged from the action during the trial. By way of inducement, the 2nd paragraph of the statement of claim alleges that, prior to and at the time of the wrongful acts of the defendant, the plaintiffs were shipwrights in the port of London, and were employed as such by the Glengall Iron Company, Limited, to execute and complete certain repairs to the steamship *Sam Weller*, at their Regent Dock, Millwall. The 5th paragraph describes the cause of action relied upon by the plaintiffs thus: "The defendant has maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the Glengall Iron Company, Limited, to break their contracts with the plaintiffs, to the plaintiffs' damage; and has further intimidated and coerced the Glengall Iron Company and others not to enter into new contracts with the plaintiffs, whereby the plaintiffs have suffered damage."

The facts of the case, as given in evidence at the trial before my brother Kennedy on February 8, 1895, are substantially as follows. The plaintiffs Flood and Taylor are shipwrights, who for several years previous to the month of April, 1894, had been, and then were, pursuing their calling in the port of London, each having served an apprenticeship to that calling with the Glengall Iron Company, under the superintendence of Mr. Edmonds, the foreman of the company's works at their Regent Dock. As apprentices they were taught, as part of the calling of shipwrights, to do both wood and iron work to all kinds of ships, wooden, composite, and iron. In the northern ports of England the wood and iron work is almost universally done by separate sets of men; the same practice prevails in some of the London docks, among them the Glengall Company's Regent Dock, where ships of all kinds are docked and repaired. There are, however, other of those docks, among them Mills & Knight's Nelson Dock at Rotherhithe, in which both wood and iron work are usually done by the same shipwrights. There the plaintiffs sometimes found employment.

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At the Glengall Regent Dock they were also frequently employed, but there, from first to last, they worked at woodwork only, and they were so working on the morning of April 13, 1894, on the *Sam Weller*, then in dock for repairs. They had been taken on "for the job" of such repairs on April 12, and were at work with twenty-two other shipwrights similarly occupied, a body of iron-workers commonly called "boiler-makers" being exclusively engaged for the ironwork. The terms upon which both the plaintiffs and the boiler-makers were employed were the usual and customary terms of such employment, namely, they were hired and engaged for the job, and were entitled to come back day by day until it was finished, or they were discharged by their employers, in the event of the work slackening (when, of course, less hands would be required), or for other just cause, e.g., disobedience or misconduct.

This contract was an existing contract on April 13. I am inclined to think it could not legally, in the absence of one of such events, be capriciously terminated at the mere will of the employer, though it was taken for granted by both parties that it could; but however that may be, the defendant himself stated that there was no corresponding option in the men to leave their work at their mere pleasure. "The men," said Allen, "must not do so without tangible reasons." The job on the *Sam Weller* lasted, in fact, about a fortnight, and there was every reason to suppose the plaintiffs would, but for the interference of the defendant, have been continued upon it until it was finished. They were very good shipwrights, of excellent character, and had always behaved themselves, and done their work properly and satisfactorily. They were and are members of the "Shipwrights' Provident Union," a union consisting of a comparatively small number of men, and confined to shipwrights of the port of London.

The defendant is by trade a "boiler-maker," and at the time in question was residing in the East India Road, London. He was a member and the London delegate of a very powerful society called the "Independent Society of Boiler Makers and Iron and Steel Ship Builders," consisting of about 40,000 members. He was not employed on the Glengall Company's works. About 100 of these boiler-makers, members of this society, were, in April, 1894, employed by the Glengall Company on ironwork exclusively, great numbers of them at the Regent Dock on the *Sam Weller*, the rest at the company's wet docks and other places. There had been no collision between plaintiffs or their colleagues on the job and the ironworkers, or any of them. But it was a fact that for a period of four months, terminating on April 11, the two plaintiffs had been working at the Nelson Dock of Mills & Knight, and that fact became known to a man named Elliott, a member of the boiler-makers' society, and one of those working in ironwork on the *Sam Weller*.

On the morning of April 13 the defendant, at the request of Elliott, came to see him at the Regent Dock, and had some conversation with him respecting the plaintiffs. He afterwards had an interview with Mr. Halkett, the managing director of the Glengall Company, in his office. The defendant commenced the interview by saying "he had received word by some of the boiler-makers working in the company's yard that they wanted to see him, and that he had had an interview with them, and they told him that the company had two shipwrights engaged in their employment who were known to have done iron-

work before, in Mills & Knight's yard; and that, unless those two men were discharged from their employment that day, all the boiler-makers belonging to his society would, on that day, leave off work." Mr. Halkett said it was very hard to be interfered with, and that the men were not doing ironwork in the company's yard. The defendant thereupon said, "We are doing our best to put an end to the practice of doing ironwork by shipwrights"; adding that it was not from any ill-feeling against them, nor against any men in particular; but they had made up their minds that, wherever it was known that any shipwrights had been engaged doing ironwork, the boiler-makers would cease work on the same ship on the same employment, "and that they would be withdrawn" from every ship or every job upon which they were engaged. With regard to Flood and Taylor, he said these men were known, and wherever they were employed the same action would be taken there as in that place. "You have no option; if you continue to engage these men our men will leave," or, "will be called out." There was some uncertainty whether the last few words were the precise words used; but, anyhow, he used the words "our men," referring to the members of the boiler-makers' society.

Mr. Edmonds was present in Mr. Halkett's office during the greater part of this interview. This is his account of it: "Mr. Halkett sent for me, and when I got to the room he said, 'Mr. Allen has come here and says that if those two men, Flood and Taylor, are not discharged, all the iron-men will knock off work or be called out' (I will not be sure which term he used). I asked Mr. Allen the reason why. He said, because those two men had been working at Mills & Knight's on ironwork. I told him I thought it was very arbitrary on his part to do anything like that; I thought it was not right that Mills & Knight's sins should be visited upon us, for the reason that we were not employing the shipwrights on ironwork, and never had done so, at the Glengall. He said the men would be called out from any yard they went to." In consequence of that interview, Mr. Halkett, in Allen's presence, then and there gave instructions that they were to be discharged, and not employed any more until the thing was settled, and told Mr. Edmonds if he, when engaging men, knew of any shipwrights having been working on ironwork elsewhere, for the sake of peace and quietness for ourselves, he was not to employ them. On that same day Flood and Taylor were discharged, and were not again employed by the Glengall Company, except for three hours, in merely docking a ship at another dock, on the following day.

It was on account of the expressions "You have no option," &c., &c., that the plaintiffs were discharged by Mr. Halkett, who was in fear of the threat being carried out, which would seriously have impeded the business of the Glengall Company, the threat being extended to every iron workman in the employment of the company at whatever place employed. If this was not coercion to do that which it was not the will of the Glengall Company to do, I know not what coercion is; at all events, it was evidence of coercion for the jury to consider.

At the trial it undoubtedly was assumed on all sides that, although the plaintiffs were engaged for the job, they were liable to be discharged by the Glengall Company, without cause, at any moment, at the mere will of their employers. Upon such assumption, it is clear that the termination of the

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contract was, as between the Glengall Company and the plaintiffs, a lawful act, in respect of which no action for breach of contract (which means wrongful breach) could be maintained against the company. I am, however, of opinion that if the word "terminate" had been substituted for "break" in the pleading, the action would, upon that ground, have been maintainable; for in the view I have taken of this case, I can discover no substantial difference between an inducement wrongfully to break a contract and a wrongful coercion to terminate one. My reasons for so thinking I shall give hereafter.

But though, for the reasons I have pointed out, I am debarred from treating the alleged coercion of the Glengall Company to break or to terminate their contract with the plaintiffs as a separate cause of action, I am not debarred from using the facts applicable to such a cause of action as evidence in the case which is substantially before us, a case which rests upon a very broad and solid foundation, requiring no technical breach of contract for its support; namely, the violation by the defendant of the legal right which each of the plaintiffs, in common with every man in this country, has to pursue freely and without wrongful hindrance, interruption, or molestation that profession, trade, or calling which he has adopted for his livelihood.

As the pleadings stood, however, at the trial, coupled with the assumption I have referred to, Kennedy J. had no alternative but to withdraw from the jury any questions based upon the first charge, and that having been so disposed of, the plaintiffs were then, and are now, driven to rest their action upon the second charge, namely, that the defendant intimidated and coerced the Glengall Company not to enter into new contracts with the plaintiffs, whereby the plaintiffs suffered damage.

The wilful invader, without lawful cause or justification, of a man's right freely to carry on his calling commits a legal wrong; and that wrong, if followed by "injury" caused thereby to him whose right is invaded, affords a legal ground of action. The right and the invasion are thus described by Sir William Erle in his most valuable treatise (published in 1869) on the law relating to trade unions. At page 12 he says: "Every person has a right under the law, as between him and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the co-relative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong, to be remedied either by action or by indictment, as the case may be."

In *Keeble* v. *Hickeringill* (1) Lord Holt C.J. said, "He that hinders another in his trade or livelihood is liable to an action for so doing"; and later on he added, "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases."

(1) 11 East, 574, n.

Sir William Blackstone, in Book III. c. viii. s. 5, of his Commentaries, when treating of malicious and slanderous words, classifies as actionable words tending to a man's damage and derogation which may impair or hurt his trade or livelihood. See also the language of Baron Alderson in *Hilton* v. *Eckersley* (1), and of Bayley J. in *Hannam* v. *Mockett*. (2)

I take it for granted that no one will question that the occupation and calling of shipwrights, followed by the plaintiffs, is comprised within the scope of these words. For myself, I have no doubt they include every calling, from that of the poorest agricultural labourer to the wealthiest merchant in the land. It is for a violation of this right that the plaintiffs have substantially brought this action, and although it is not in words so stated in the pleadings, which describe only two of the wrongful acts done in carrying out this invasion, each of them, if proved, is in itself a cause of action, and so no difficulty arises in dealing with the real grievance of which the plaintiffs complain. I proceed to give my reasons for the opinion I have expressed.

I look upon the case of *Lumley* v. *Gye* (3) as a binding authority that if any person, with knowledge of the existence of a contract of service between two other persons, the one to employ the other to render service, wilfully causes and induces the employed to break his contract, and an injury to the employer is the result of that breach, an action on the case will lie against him at the suit of the employer. I see no reason to doubt that a corresponding right of action exists in law at the suit of the employed against a person who wrongfully induces the employer to break his contract to the injury of the employed. This principle is, in my opinion, sound and in accordance with good sense. Each party to a lawful contract, whether for service or anything else, has a legal right to have it observed by the other, and the failure to perform it by that other is a wrong or injury done by him (Bl. Com. Book III. c. ix. s. 3), and any one who wrongfully and knowingly procures a breach of a contract by one party to the injury of the other is liable to make the party injured reparation in damages: see per Erle J. (4) This principle was fully recognised in *Bowen* v. *Hall* (5) and in *Temperton* v. *Russell*. (6) In the latter case, Collins J. applied the principle to trade contracts as well as to contracts of hiring and service.

For the defendant it was speciously urged that the plaintiffs had no legal right either to insist upon the continuance of the contract which was in existence on the morning of April 13, or to claim from the Glengall Company new contracts of employment in the future; and, therefore, the abrupt termination of the one, and the refusal to enter into the other, were both lawful when done by the company. In this I entirely agree; but it is a fallacy to suppose that the defendant can justify the wrongful conduct attributed to him in bringing about these acts of the company simply because it was not unlawful in the company to do them.

The wrongful conduct of the defendant complained of preceded and brought about the injurious though lawful action of the Glengall Company; and the

(1) (1856) 6 E. & B. at pp. 74–5.
(2) (1824) 2 B. & C. 934.
(3) (1853) 2 E. & B. 216.
(4) 2 E. & B. at pp. 232, 233.
(5) (1881) 6 Q. B. D. 333.
(6) [1893] 1 Q. B. 715.

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plaintiffs' grievance is not against the company for their action, but against the defendant for using wrongful means to bring it about, in order to accomplish the unlawful and hurtful object he or the boiler-makers had in view. I venture to think no authority is needed for this.

I know it may be asked, What is the legal right of the plaintiffs which is said to have been invaded? My answer is, That right which should never be lost sight of, and which I have already stated—the right freely to pursue their lawful calling. Involved in that right, and a component part of it, is the right to the full benefit of that valuable interest they had in what Lord Ellenborough in *Pitt* v. *Donovan* (1) termed a "probable expectation" (as distinguished from a vested legal interest), an essential element in promoting the success, and contributing to the value, of every occupation by which the means of living are obtained. The daily labourer, whose tested character for steadiness, honesty, and industry has induced his master, as a matter of course, through a long series of years, week by week to renew or continue his employment, finds in this the foundation for his "reasonable and probable expectation" that he may rely on continual employment in the future. These "probable expectations" are equally applicable to all trades, great and small. The merchant prince looks to amassing wealth by a succession of successful ventures, which until realized are but, more or less, "probable expectancies." The shopkeeper who is dependent upon a succession of future customers for the prosperity of his business has no legal right to claim their custom; he has but a "probable expectancy" that he may obtain it. It is analogous to the goodwill of a business sold to a new firm, which Lindley L.J. describes as "the benefit arising from connection and reputation": Lindley on Partnership, vol. i. p. 441; and Lord Romilly as "the probability of the old customers going to the new firm" in *Labouchere* v. *Dawson*. (2)

All rely upon "probable expectations" attached to their trade or calling, and the law throws its protection round each and every man in his honest endeavours to earn his livelihood. This is illustrated by the action for slander of a man's character and conduct as a trader, and the recognition of this principle is to be found in a variety of recorded cases. Destroy this protection, and the man would be left with the mere empty name of his calling subject to unscrupulous and oppressive rivalry and aggression, in which the right of the weak would of necessity give way to the power of the strong. Some of the cases decided under the Hungerford Market Act, although they were so decided under a special Act (11 Geo. 4, c. lxx. s. 19), appear to me to recognise this interest in the probable expectation of trade. In *Ex parte Farlow* (3) a tenant from year to year was ejected for the purposes of the undertaking; she had received a regular half-year's notice to quit; but she had been many years in possession, and it appeared that her tenancy was not likely to have been determined if the Act had not been passed. It was held that she was entitled to compensation for the whole marketable interest which she had in the premises at the time when the Act was passed, and that the goodwill of the premises, though on so uncertain a tenure, was protected by the Act as an interest which

(1) (1813) 1 M. & S. 639. (2) (1872) L. R. 13 Eq. 322.
(3) (1831) 2 B. & Ad. 341.

would practically have been valuable as between the tenant and a purchaser, though it was not a legal interest as against the landlord: see also *Ex parte Gosling* (1) and *Ex parte Still.* (2)

Considering the infinite variety of circumstances under which, and the modes by which, the right I have just discussed may be wrongfully invaded, I feel it would be vain to attempt to do more than speak very generally upon that subject, for each case must of necessity depend upon its own particular circumstances. I will but mention two or three of the cases illustrating the character of invasion which has been held actionable. See *Garret* v. *Taylor* (3), where the defendant injured the plaintiff in working his stone quarry by threatening his workmen and intending customers by words only to mayhem and vex them with suits if they worked or bought his stone. See also *Tarleton* v. *M'Gawley* (4), where the defendants, without any desire to personally injure the plaintiff, a merchant desirous of availing himself of the opportunity of trading with some of the natives of a place on the coast of Africa, wilfully fired at a canoe then being used by some of those natives, for the purpose of such trading, killing one of them, and so deterring the rest from bargaining with the plaintiff, whereby he sustained damage. See also *Keeble* v. *Hickeringill* (5), where the defendant was sued for disturbing by noises the plaintiff's decoy for wild ducks, from which the plaintiff derived profit.

It signifies not, in my opinion, whether such acts or words are done directly to, or spoken of, the complaining trader or worker himself, or to or of any other person who assists him in carrying it on (see *Riding* v. *Smith* (6), for slander affecting the plaintiff's business as a shopkeeper, by using defamatory language imputing immorality to his wife, who transacted much of the business of it).

In the course of the argument it was suggested that to render threats, menaces, intimidation, or coercion available as elements in a cause of action, they must be of such a character as to create fear of personal violence. I find, however, no authority for such a suggestion; for although, no doubt, it is true that in many of the cases the threats were in fact threats of personal injury, I know of none in which the element of personal violence has been held to be essential. *Garret* v. *Taylor* (3) rather tends to the contrary view, which is that which I adopt: see *Reg.* v. *Miard* (7); *Reg.* v. *Tomlinson* (8); *Reg.* v. *Walton.* (9) The cases of *Gibson* v. *Lawson* and *Curran* v. *Treleaven* (10) are not authorities which assist the defendant in his contention; they were cases merely dealing with the limited character of intimidation necessary to justify a criminal conviction under s. 7, sub-s. 1, in the Conspiracy Act, 1875 (38 & 39 Vict. c. 86), and did not profess to deal with civil rights or wrongs at common law. We are not to-day dealing with a criminal charge.

In my opinion, any menacing action or language, the influence of which no man of ordinary firmness or strength of mind can reasonably be expected to resist if used or employed with the intent to destroy the freedom of will in another,

(1) (1833) 4 B. & Ad. 596.
(2) (1833) 4 B. & Ad. 592.
(3) Cro. Jac. 567.
(4) 1 Peake, N. P. C. 270.
(5) 11 East, 574, n.
(6) (1876) 1 Ex. D. 91.
(7) 1 Cox, C. C. 22.
(8) [1895] 1 Q. B. 706.
(9) L. & C. 288.
(10) [1891] 2 Q. B. 545.

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and to compel him through fear of such menaces to do that which it is not his will to do, and which being done is calculated to cause injury to him or some other person, amounts to an attempt to intimidate and coerce; and if such attempt is successful, the object attained under such influence is attained by coercion, and the person wrongfully injured by it, whether in his person, property, or rights, may sue the coercer for reparation in damages. *Williams* v. *Bayley* (1) is a fair example of such coercion in a civil case. That was a case where an agreement to pay money in respect of forged bills of exchange was set aside as having been obtained under fear of threats of a criminal prosecution for forgery of the son of the applicant. I need hardly say that in each particular case it is for the judge to say whether there is evidence of coercion, and if he thinks there is, then it is for the jury to say whether the wrongful acts or language charged were in fact done or spoken, and whether, subject to the direction of the judge, they amounted to coercion: *Reg.* v. *Walton.* (2)

It is now desirable, in my view, to say a few words on the subject of "malice," which is alleged to have prompted the defendant's conduct in that which is complained of. When malice is an essential element in a cause of action it is difficult to express in a sentence; for in legal acceptation the terms "malice" and "maliciously" comprise so many wrongful motives and acts, the cases bearing upon them are so numerous, and the pleaders, both ancient and modern, so far as they exist, have been in the habit, out of extreme caution, of grouping them with such a host of other expletives, that one derives but little valuable information from the mere use of the terms as to the sense in which they are employed. The definition of legal malice which most thoroughly commends itself to my mind is that expressed by Bayley J. in *Bromage* v. *Prosser* (3), which is the basis of most of the definitions of the word to be found in a host of subsequent authorities. "Malice," said that very learned judge, "in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."

I confess for my own part that I should prefer to confine the term "malice" to its ordinary and popular acceptation; and when that ordinary acceptation is inappropriate, to state the specific wrongful motive or act which brings it within the legal acceptation of "malice" as it is now understood.

If I rightly estimate the effect of the plaintiffs' evidence, I do not think anything falling within the ordinary popular acceptation of "malice," such as spite or ill-will, is at all essential to the maintenance of this present action, although, if it be so, there is evidence of its existence; a wrongful motive, however, is, in my opinion, essential. It is clear that an action for a direct and wilful trespass committed upon the person or property of another may be maintained without averring or proving either malice or bad motive. It is the same if a man's legal right is knowingly and wilfully violated. In every case, however, proof that such malice and an intention to injure prompted the wrongful acts would, of course, be material in the consideration of damages.

It is equally true that if a defendant, by way of excuse or justification of a

(1) (1866) L. R. 1 H. L. 200. (2) L. & C. 288.
(3) (1825) 4 B. & C. 255.

trespass or other wrongful act, can satisfy the tribunal by which the matter is to be determined that he did such acts in the bonâ fide exercise of a legal right or privilege vested in him, no amount of even personal hatred or bad motive co-existing in his mind will render that unlawful which without it is lawful. The cases of *Oakes* v. *Wood* (1), *Stevenson* v. *Newnham* (2), and *Bradford Corporation* v. *Pickles* (3), will I think be sufficient illustrations of these propositions.

There are, however, some acts the quality and character of which may be either rightful or wrongful, having regard to the motives with which they are done. Take, for instance, an act which is privileged when done bonâ fide in the exercise of a right to do it on a particular occasion, and a precisely similar act done on a similar occasion, but not in the bonâ fide exercise of the right, but malâ fide in the abuse of it, for the purpose of injuring another under the cloak or false pretence of using a privilege. In the first case the act would be rightful, in the latter wrongful. Wrongful, not because it was a malicious use of the privilege, but because as the person doing it was not using his privilege at all his action was as unconnected with it as though it had no existence.

This seems to have been the view taken by Lord Ellenborough in *Pitt* v. *Donovan* (4), which was an action for slander of title, the defendant claiming privilege as his excuse. Lord Ellenborough held that the question for the jury was whether the defendant bonâ fide believed in the truth of the statements constituting the slander, or whether he did not use the privilege he claimed as a mere pretence, colour, and cloak for his slander. The ordinary action for malicious prosecution affords another good illustration of what I desire to convey. Every person has the privilege, and on some occasions it is his duty in the interests of public justice to put the criminal law in motion against another whom he bonâ fide, and upon reasonable and probable cause, believes to have been guilty of a crime. To exercise this privilege bonâ fide or simply to discharge this duty is lawful and right, even though the accused may be shewn to be innocent and to have been gravely injured by the proceedings taken against him. If, however, a person with the wicked motive to cause injury to another person in whose guilt he had no real belief were to institute a criminal prosecution against him, the law would not protect him, because having abused his privilege to effect a wrong he could not avail himself of it to shield himself from the consequences of his misconduct.

It must not, however, be supposed that hatred and ill-will existing in the mind of the prosecutor must of necessity destroy the privilege, for it is not impossible that such hatred and ill-will may for very natural and pardonable reasons exist, and yet that a sense of public duty alone, unaffected by such ill-feeling, may have actuated him to institute the prosecution. Whether it did or not would be a question for the jury. These considerations explain the reason of the judgment in *Keeble* v. *Hickeringill* (5), where the defendant, with the object of injuring the plaintiff in the use of his duck decoy, of which he made profits, wilfully fired off guns upon his own adjoining land and made loud

(1) (1837) 2 M. & W. 791.
(2) 13 C. B. 285.
(3) [1895] A. C. 587.
(4) 1 M. & S. 639.
(5) 11 East, 574, n.

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noises solely to frighten the plaintiff's ducks from his decoy. These were held to be wrongful acts—they were intentionally done with a sinister motive, which falls within the definition of legal malice; and yet the defendant had undoubtedly the privilege of shooting upon his own land, and if in the bonâ fide exercise of it he had made the same noises on the same spot and with the same results in shooting his own game he would have been acting within his right to use as he pleased his own land for his own legitimate purposes; but as he was not then so doing, but was using his land solely for the purpose of injuring his neighbour in his trade, he could not justify himself under the right he otherwise would have had.

I cannot say that I agree in the judgment in *Carrington* v. *Taylor* (1), reported as though it were a confirmation of *Keeble* v. *Hickeringill* (2), for I fail to see what wrong the defendant in that case had done. The report of it, however, is scanty, and not very satisfactory. *Hannam* v. *Mockett* (3) was decided on the ground that though the rooks were frightened away from the plaintiff's rookery the plaintiff had no right to insist upon having them in his neighbourhood, and they were not the subjects of trade or commerce. *Harrison* v. *Duke of Rutland* (4) was decided upon the same principle—that to pretend to use a legal privilege as a mere cloak for doing a wrongful act to the prejudice of another affords the wrongdoer no more protection, and gives him no greater right, than if that privilege had no existence. That was an action for an assault committed by gamekeepers of the Duke of Rutland, who was the owner and occupier of a grouse moor, crossed and intersected by a public highway, the soil of which also belonged to the Duke. On the occasion in question the Duke and some of his friends were shooting over the moor. The plaintiff, with the sole object of interfering with the Duke's enjoyment of his right of shooting, went on to the highway, not at all for the purpose of using it as such. The keepers forcibly prevented the plaintiff from carrying out his wrongful object. It was held they were justified, for that the plaintiff being on the highway for other purposes than the use of it as a highway, he was a trespasser. See also *Reg.* v. *Pratt.* (5)

The same principle had already long before been recognised in the case of *Lucas* v. *Nockells* (6), where a person, having authority in law to seize goods in order to levy money under a writ of fieri facias, seized such goods under the pretence of exercising such authority, whereas in fact he seized them for a totally different and sinister purpose, using the writ as a mere cloak. He could not therefore justify his act, although the writ would have protected him had he really acted under it. It is right, however, to add that the actual judgment turned on a question of admissibility of evidence, having regard to the pleadings.

The same principle applies to words spoken or libels published. A person who gives bonâ fide the character of a servant to his intending employer, in giving that character, is privileged to write or speak of such servant that which he honestly believes to be true, even though in so doing he may cause serious

(1) 11 East, 574.
(2) 11 East, 574, n.
(3) 2 B. & C. 934.
(4) [1893] 1 Q. B. 142.
(5) (1855) 4 E. & B. 860.
(6) (1833) 10 Bing. 157.

injury to the servant by leading the intending employer to refuse to engage him. But if, under the mere pretence of giving an honest opinion as to the character, he knowingly abuses the occasion, and out of mere spite towards the servant or for other sinister motive he knowingly and falsely gives him a bad character, his privilege will not avail him. The principle upon which all these cases were decided is peculiarly applicable to the present action. I can imagine a state of things in which the defendant might have rightfully, in the bonâ fide exercise of a privilege or a duty, done and said what he did, but, having acted and spoken under the prompting of malice or bad motive, those actions and words were wrongful, and without any privilege to excuse or justify them.

I must now deal with the case of *Temperton* v. *Russell* (1), which was tried before Collins J., and deserves serious attention. The action was for maliciously inducing persons to break their trade contracts with the plaintiff; and, secondly, for conspiring to induce persons not to enter into contracts with him. Under the direction of the learned judge, confirmed to its fullest extent by the Court of Appeal, the jury found and the judgment was entered for the plaintiff. In the present case no contract was broken, and no such conspiracy to induce the Glengall Company to dismiss the plaintiffs as was alleged in the pleadings was proved.

For the defendant it was urged that without conspiracy there was no legal cause of action arising out of the conduct of the defendant. Upon this point, however, Lord Esher, in *Temperton* v. *Russell* (1), distinctly expressed his opinion that there was no substantial distinction between a malicious inducement to break and a similar inducement not to enter into new contracts of service, and that the latter claim was maintainable without the element of conspiracy. In this I cordially agree. A person whose livelihood is earned by working for others needs a constant succession of contracts for employment for the profitable maintenance of his calling. Whether such contracts are for longer or shorter periods is immaterial. Without such engagements his calling could not exist. Wrongfully to induce an employer to break his contract and discharge his workman is wrongfully to injure that workman by disabling him from earning his wages. Wrongfully to coerce an employer to terminate an existing contract before its appointed time brings upon the employed precisely the same character of injury. The coercion of a would-be employer not to enter into future contracts for employment with a particular workman prevents that workman from earning the wages which would have accrued to him as the result of his employment. In each of these cases the sinister object of the wrongdoer is the same, namely, to hinder the workman in his calling, and the same character of injury is the result. I fail to see any distinction in principle between them. In the present case the two latter wrongs are combined in order to accomplish the same unlawful object. In the present case the malicious motive to inflict punishment upon men who had been guilty of no wrong is added.

I have endeavoured to state the principles upon which this case ought, in my opinion, to be decided, and in dealing with the evidence I have confined myself to the substance of that given by the witnesses called for the plaintiff,

(1) [1893] 1 Q. B. 715.

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for, having regard to the finding of the jury, I assume that wheresoever the testimony of the defendant is in conflict with that of Mr. Halkett and Mr. Edmonds the latter is to be preferred.

I do not, however, understand your Lordships' question as excluding from our consideration any additional testimony in support of the plaintiffs' case furnished by the evidence of the defendant himself or of Elliott his witness. I proceed, therefore, to point out some matters to be found in that testimony which add considerable weight to the plaintiffs' case. I will take a few extracts from the defendant's account of his interview with Elliott. "He told me that our members had made up their minds to cease to work in the establishment with those men," meaning the plaintiffs. "I told him that he must be very careful, and the members as well, to continue on at their work, and to take no notice of anybody, only receive orders from their foreman and their employers; that they were by no means to leave their employment. Elliott told me the men would leave at dinner time. My answer to him was, If the men take the law into their own hands, I will see, as far as my influence with the executive council at Newcastle is concerned, that they will be deprived of all benefit from the society, and in addition be fined if they leave their work. Elliott then said he would communicate what I had told him to the men." The defendant admitted that when he saw Mr. Halkett he expected the men would remain. He admitted that when the plaintiffs were in Glengall Dock they were doing nothing wrong, and that his opinion at the time was that where shipwrights were confining themselves to their woodwork they were quite justified in pursuing that course; but he added that the boiler-makers did not fall out with what the plaintiffs were doing at the time, but what they had been doing, and that what was being done against them was to punish them for what they had done in the past. He admitted also that after having seen Mr. Halkett he went direct home to his own residence and did not communicate with, or report to, the boiler-makers. Without any such corroboration, however, I am of opinion that the evidence of the plaintiffs' witnesses alone furnished amply sufficient evidence to go to the jury to support the cause of action relied on.

I confess myself at a loss to understand what legal excuse or justification the defendant can really depend upon as his defence. If he merely represented the boiler-makers in doing and saying what he did, that would afford him no justification, unless the boiler-makers themselves could have justified such conduct. The wilful doer of a wrongful act, though only as the agent of another, is equally guilty as the principal who employs him: see *Rogers* v. *Rajendro Dutt*. (1) I cannot resist making this further observation—that if he had merely acted on the instructions of Elliott or any other member of the boiler-makers in doing that which he wrongfully did, that would afford abundant evidence of a conspiracy between him and that member, similar to that proved in *Temperton* v. *Russell*. (2)

It was said that the boiler-makers were free to say, and had a right to insist, that they would not work in the same employment with the plaintiffs: see *Rogers* v. *Rajendro Dutt* (1); and that they, or the defendant as their repre-

(1) (1860) 13 Moo. P. C. 209, 236. (2) [1893] 1 Q. B. 715.

sentative, were privileged in taking the steps the defendant took for the purpose of giving to the Glengall Company friendly warning of the intention of the boiler-makers to leave their employment in a body if the plaintiffs were retained in it, with a view to enable them to exercise their option which body of men they would retain, and to take steps to avert any ill consequences. I cannot express my view upon this better than by repeating the words of Cockburn C.J. in *Walsby* v. *Anley* (1): "Every workman, so long as he is not bound by any contract, is entitled when in the service of an employer, to the free and unfettered exercise of his own discretion, whether he will remain in that service in conjunction with any other workman with whom he may not choose to serve," but that such dissatisfied workman ought fairly to give the master the alternative, and if he fails to do so, but seeks to coerce him, by threats of doing something that is likely to operate to his injury, into the discharge of the obnoxious fellow-workmen, he is not acting within his rights. It is true that the case in which that language was used was one in which a workman had been charged with a criminal offence under s. 3 of the Trades Union Act (6 Geo. 4, c. 129), but the same principle applies whether in a criminal or a civil case like the present.

In this case, first, the boiler-makers were not free: they were under contracts with the Glengall Company until the job on which they were engaged was finished, and they could not have left their work without breaking their contracts. Secondly, the defendant gave the Glengall Company no real or bonâ fide option. He put it to them simply that they had no option except to discharge the plaintiffs, and promise not to employ them again. I would refer to his own testimony touching the injunctions he gave to Elliott, and the warning he sent to the men, coupled with the fact that when he had accomplished his object, and the orders had been given for the dismissal of the plaintiffs, he went straight home and never told or reported to the boiler-makers or to Elliott that the plaintiffs had been discharged, and that there no longer existed any reason, or the semblance of an excuse, for leaving their work. This he surely would have done had he honestly believed that which he positively asserted as a fact to Mr. Halkett, namely, that the boiler-makers intended in a body to leave at dinner-time that day if the plaintiffs were not discharged. I think this conduct was evidence fit to be considered by the jury, that the men had no intention to leave, that the defendant could not have believed they had, but that the firm intention of both was to remain, and to drive out the plaintiffs, and that the assertions made to Mr. Halkett were falsely made for the mere purpose of intimidation.

I do not think it necessary to discuss the case of *Mogul Co.* v. *McGregor* (2), because there is no ground for even a suggestion that the defendant's acts were due to competition in trade or employment. There could be no competition between the two sets of men in the circumstances under which they were then working, the one at wood, the other at iron only; and even if they were competing, the plaintiffs were working well within their right.

It was said that the conduct of the defendant was dictated by a desire to

(1) (1861) 30 L. J. (M.C.) 121.
(2) 23 Q. B. D. 598, 604; [1892] A. C. 25.

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protect trade interests. How or in what way it was not stated, and it is difficult to conjecture. If the boiler-makers had been in any way interrupted or obstructed in their work by the plaintiffs the case might have been different. I know not what rules the boiler-makers' society has laid down for its own men to follow. What are their respective rights and duties as between themselves I am not concerned now to discuss. I can, however, hardly credit that any of its officers can approve of the high-handed conduct of the defendant, or think it within their power wilfully to punish innocent men, not belonging to their society nor bound by their rules, for not yielding to their wishes, or in order to restrain them in the mode in which they should carry out their calling, so long as they do not actively interfere with the calling and violate the rights of the boiler-makers themselves. For myself I can only express my opinion that no man or body of men, whether in the name of an union or otherwise, can lawfully invade the right of another to exercise his own calling without hindrance, unless he or they can shew lawful excuse or justification for so doing, which I have failed to discover here, or unless authorized by some Act of Parliament. Acts of Parliament there undoubtedly are protecting trades unions from certain criminal charges, but none justifying an invasion of the right which I have discussed.

Being satisfied that that right of the plaintiffs is established by law, I think there is an abundance of evidence fit to be left to the jury that, without excuse or justification, and not in the exercise of any privilege or in defence of any right either of his own or the boiler-makers, the defendant has wilfully, unlawfully, unjustly, and tyrannically invaded and violated the plaintiffs' right by intimidating and coercing their employers to deprive them of their present and future employment, to their injury; and the plaintiffs therefore are entitled to maintain this action.

MATHEW J. My Lords, the plaintiffs were shipwrights and members of a trade union called the Shipwrights' Provident Union, and were employed by the Glengall Iron Company in April, 1894, upon the repairs of the ship *Sam Weller*. The company had also engaged for the ironwork upon the ship a number of men who were members of a trade union called the United Society of Boiler Makers and Iron Ship Builders. A dispute had arisen between the two trades as to the claim of the shipwrights to do ironwork, and members of the boiler-makers' union had agreed among themselves, with a view to preventing what they considered unfair competition, that they would not work with shipwrights who sought and obtained employment outside their own trade. It would seem clear that combinations among working men for the purpose of preventing competition, or to keep up wages, if carried into effect by means which are not illegal and are proper for the purpose, would not be unlawful, and that a refusal to work with intruders would not be actionable: *Collins* v. *Locke*. (1)

The plaintiffs immediately before their engagement by the Glengall Iron Company had been employed at the yard of a firm of Mills & Knight to do ironwork, and when they began the repairs of the *Sam Weller* on April 12,

(1) (1879) 4 App. Cas. 674.

1894, they found that the ironworkers resented their presence, and shewed that they were unwilling to continue to work with them. In the course of the day the defendant, who was a member of the boiler-makers' union and a district delegate, was sent for by some of the men of his union, and was informed by them that they would not go on with their work if the plaintiffs were employed. They were not entitled, according to the rules of the union, to throw up their work without the sanction of the executive council at Newcastle. The defendant pointed this out to the men, but he agreed on their behalf to see the manager of the Glengall Iron Company. There is some discrepancy between the statements of the witnesses for the plaintiffs as to what took place between the defendant and the manager, but it is clear that he gave the manager to understand that if the plaintiffs were not discharged the ironworkers would leave. The plaintiffs, under the terms of their engagement with the company, might be sent away at the end of each day, and after the interview with the defendant the manager discharged them. In so doing he acted, not from any desire to forward the views of the ironworkers or the defendant, but from no other motive than the wish to prevent the injury to the company's business which would be caused by a strike. The dismissal was the exclusive act of the company, and in strictness the defendant could not be said either to have caused, procured, or induced it.

This action was afterwards brought against the defendant for having maliciously and wrongfully and with intent to injure the plaintiffs procured and induced the Glengall Iron Company not to engage or employ the plaintiffs as shipwrights. The defendant in his defence denied these allegations. The legal effect of the statement of claim seems clear. The defendant is charged with malice in law, that is, with wrongful conduct, which violated a right of the plaintiffs. Upon any other construction I do not see that a cause of action would be disclosed.

The word "malice" in civil proceedings is calculated to mislead, because it suggests that an act will acquire or will lose a tortious character from the motive with which the act is done. But no motive, however meritorious, will excuse a wrongful act which deprives another of his right; while, on the other hand, the exercise of a right which causes loss will not be actionable, even though the motive may be malicious in the ordinary sense of the term. The phrase "malice in fact" also tends to confuse, for it may mean no more than an indirect motive. In the charge of malice in law personal malevolence is not necessarily imputed, and it is most important to bear in mind that it was admitted at the trial that there was no ground for charging the defendant with having acted from any ill-will to the plaintiffs.

The case made for the plaintiffs at the trial was that the defendant had acted wrongfully and unlawfully, with the object and the result that they were deprived of what was said to be a right, namely, the right to follow their trade and earn wages. It is clear that the alleged right of the plaintiffs did not arise under any contracts with the Glengall Company, but, as appears from the judgments under review, no distinction is drawn between inducing a breach of contract and preventing a contract from being entered into. It seems to me the distinction is all-important, and, even if the dismissal could be treated as the act of the defendant, I am unable to see how the plaintiffs could sue him

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as a wrongdoer. No right of theirs was infringed. Their loss was damnum sine injuria.

But, upon the arguments addressed to your Lordships for the respondents, the case was sought to be put upon a different footing. It was said that the right which the defendant was supposed to have infringed was the right to follow a trade without interference, and the wrongful conduct imputed to the defendant was that without just cause he influenced their employers to dismiss the plaintiffs. The first question, therefore, is whether the plaintiffs had the right which the defendant is alleged to have violated. The argument was that those who carry on trade and the skilled workmen whom they employ have an interest in their occupations like the property in land or personalty. It was admitted to be a right of a somewhat limited character. It was not disputed that it might be invaded in the course of fair competition, or by the operation of trade combinations, and that as every man was free to conduct his own affairs as he pleased, he might refuse to employ, as had been done by the Glengall Company in this case. Further, it was conceded that advice not to make a contract might not be an actionable wrong. But the remnant of the supposed property in trade or occupation, which was left after these allowances, was said to be especially favoured and protected by the law, and that to interfere with those engaged in trade or their workmen without just cause, that is from any indirect motive, was an actionable tort. No authority was cited for this supposed rule. It seems strange that a principle affecting so materially every branch of trade should have hitherto remained dormant in the law, and should never have received authoritative definition.

No reason was given why the contracts made by other classes of the community should not receive the same protection, nor was it shewn how such protection could be afforded without serious interference with liberty of conduct and freedom of speech. If there were any such rule of law some extraordinary consequences would appear to follow, e.g., the question whether advice not to enter into a contract was given from an indirect motive, and therefore without just cause, must be left to the jury, a tribunal which seems to me altogether unfit for such an inquiry. It would be for the jury to say whether the motive, or the predominant motive, of the defendant was indirect, and therefore actionable.

Again—to put another case—A., acting on insufficient information as to B.'s solvency, induces a judgment creditor to levy an execution, and thereby ruins B., the judgment debtor. If (as is the law in actions for malicious prosecution) the absence of proper inquiry shews want of reasonable cause, and want of reasonable cause is evidence of indirect motive, A. might be made liable for all the consequences to B. of the execution. The next step would seem to be inevitable, that the judgment creditor would also be liable to an action unless he could satisfy a jury that he acted from no other motive than the natural desire to be paid what was due to him. But it has hitherto been regarded as settled law that no such action will lie.

I am not aware of any authority for the proposition that the law recognises a man's interest in his trade, profession, or business as analogous to property in land or to a right created by contract.

To shew that an interference with trade was actionable many cases were

cited, and the decoy cases reported in 11 East were referred to as containing the key to the supposed rule. But it is perfectly clear that no such proposition as that interference with the use of property for purposes of trade or profit would be actionable was intended to be laid down. It is pointed out by Holt C.J. that if the defendant had fired at birds on his own land in the exercise of ordinary rights of property, though the consequences to the plaintiff may have been the same, no action would lie. The cause of action was the unlawful conduct which injured the plaintiff in the enjoyment of his property, and was like the wrong done by carrying on a noisy or offensive trade. In *Green* v. *London General Omnibus Co.* (1) the same principle is illustrated. The ground of action was the unlawful use of the highway for the purpose of obstructing the plaintiff in his business. In the case cited from Peake (*Tarleton* v. *M'Gawley* (2)) the defendant had threatened personal violence to the natives who dealt with the plaintiff. In *Winsmore* v. *Greenbank* (3) the wife was guilty of an unlawful act in absenting herself from her husband, and the defendant, who had "procured" (that is, as stated in the judgment, had "persuaded with effect") that she should continue to absent herself, was made answerable for her act.

The cases referred to with respect to slander of a man in his trade or occupation do not assist the argument for the plaintiffs. The line is clearly drawn between disparagement of the goods in which a trader deals and of his conduct in carrying on his business: *Western Counties Manure Co.* v. *Lawes.* (4) The too familiar denunciations of the public-house are not actionable. A warning against the goods in which a man deals is permissible, but the seller must not be attacked unless the occasion is privileged or the charges are true. The interest in the trade which a man carries on may be described figuratively as his property or as an investment of his industry and skill from which he is entitled to receive a return. But a man cannot be said to have a right to that which no one is bound to provide for him, namely, employment in his trade or business. It seems equally clear that he cannot be said to have a right to the hope of such employment.

In the Court of Appeal their Lordships would seem to have decided that, although it was admitted at the trial that the defendant had not acted from any ill-will to the plaintiffs, the jury might find that the act of the defendant had been malicious. It was held to be evidence of malice that the act of the defendant had caused loss to the plaintiffs, and because it was malicious it was said to be wrongful, and therefore actionable. But, with deference to opinions entitled to so much respect, motive would, in my judgment, be immaterial unless a right of the plaintiffs was infringed. The formula repeated from the judgment in *Bowen* v. *Hall* (5) might, it seems to me, be equally available where a dismissal was brought about by the refusal of workmen to permit the employment with them of a person to whom they objected on reasonable grounds. For malice might be inferred from the knowledge that dismissal would occasion loss, and what is malicious is said to be actionable. It would

(1) 7 C. B. (N.S.) 290.
(2) 1 Peake, N. P. C. 270.
(3) (1745) Willes, 577.
(4) L. R. 9 Ex. 218.
(5) 6 Q. B. D. 333.

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follow that an agent of the workmen through whom the employer was informed of what they proposed to do (as well as each of the workmen) would be liable to be sued as a wrongdoer, although it could be shewn that the instructions given to the agent had been followed to the letter. Further, the reasoning would appear to be applicable to a "lock-out" as well as a "strike."

But another view of the plaintiffs' case was submitted to your Lordships, which differed materially from that presented to Kennedy J. or the jury. It was said that the principle of *Lumley* v. *Gye* (1) might well be extended to the present case, for though the plaintiffs had no right under contract to be retained in the service of the Glengall Company, they would in the ordinary course of business have been employed until the repairs of the ship approached completion. The interference of the defendant had led to their dismissal, and this interference, it was argued, was wrongful, because the statements made by him to the employers were untrue. In other words, the plaintiffs' liberty of conduct was alleged to be interfered with wrongfully by the defendant's abuse of his liberty of speech. The defendant's representations were said to be false, because he had stated first that he had authority to speak for all the ironworkers, whereas he had only communicated with some of them, and secondly, because he had said that unless the plaintiffs were dismissed all the ironworkers would leave. But from the evidence given by the plaintiffs' witnesses, Edmonds and Halkett, the jury might properly find that the defendant had not misled or intended to mislead. Halkett did not complain that he had been misinformed. He acted at the time, and subsequently, without question, on the information given him, that there was a trade dispute which might end in a strike if the plaintiffs were not dismissed.

But this suggestion of the respondents' counsel, made for the first time in the argument before your Lordships, seems to me to be disposed of by the consideration that it really involves a charge of fraud against the defendant, not made in the pleadings or at the trial, and which he had no opportunity of meeting. I can find no evidence that the defendant had acted dishonestly or in bad faith. Even if it could be said that there had been intentional exaggeration in the defendant's statements, it would not follow that the defendant's conduct was tortious. Words may be uttered which are false and even malicious, and yet the limits of free speech may not be overstepped. Assuming that there was some truth in what the defendant said, it would be impossible, in my judgment, to expect a jury to deal satisfactorily with the question whether that which was accurate, or that which was inaccurate, in the defendant's statements had influenced the employers.

It seems to me that there was no evidence that the representations made by the defendant were wrongful, or that any right of the plaintiffs was infringed, and I therefore answer your Lordships' question in the negative.

CAVE J. My Lords, before proceeding to deal with the question your Lordships have asked, it is desirable to refer to certain general principles that must always be borne in mind. One of these is that every wrong involves the violation or disturbance of some right, and, conversely, that every right is

(1) 2 E. & B. 216.

protected from violation or disturbance by its appropriate action. Another is, that malice alone never constitutes a cause of action, or, in other words, does not make that a wrong which otherwise would not be a wrong. The law of malicious prosecution is no exception, for prosecution involves scandal to reputation, or loss of liberty, or both; and although for reasons of public policy resort to legal process is justifiable wherever there is reasonable and probable cause, so that there must not only be want of reasonable and probable cause but also malice, yet the proof of malice does not involve the recognition of a new right, but simply affords an answer to a state of circumstances under which the violation of these elementary rights would not be actionable. Thus, in *Stevenson* v. *Newnham* (1) it was held that a count in case for distraining for more rent than was due was bad, though it alleged it to have been done maliciously, on the ground that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent. So, in *Bradford Corporation* v. *Pickles* (2), it was held by your Lordships that no use of property which otherwise would be legal can become illegal merely because it is prompted by a motive which is improper or even malicious.

The personal rights with which we are most familiar are: 1. Rights of reputation; 2. Rights of bodily safety and freedom; 3. Rights of property; or, in other words, rights relative to the mind, body, and estate; and, if the general word "estate" is substituted for "property," these three rights will be found to embrace all the personal rights that are known to the law; but in that case it must be admitted that the third class is very general, and embraces a good many subdivisions, which, however, like causes in natural science, are not to be unnecessarily multiplied. In my subsequent remarks the word "right" will, as far as possible, always be used in the above sense; and it is the more necessary to insist on this as during the argument at your Lordships' bar it was frequently used in a much wider and more indefinite sense. Thus, it was said that a man has a perfect right to fire off a gun, when all that was meant, apparently, was that a man has a freedom or liberty to fire off a gun so long as he does not violate or infringe any one's rights in doing so, which is a very different thing from a right the violation or disturbance of which can be remedied or prevented by legal process.

The first point to be disposed of is whether among the subdivisions of rights of property or estate the common law recognises the right to acquire property—that is, recognises it as a right to be protected by action against violation or disturbance, and not merely as a freedom or liberty to be enjoyed so long as it does not interfere with other people's rights properly so-called, but not to be protected in any case by action.

The first instance I know of such a right being claimed occurs in A.D. 1410 in the 11 Hen. 4 (fo. 47, pl. 21), where it was held that if one schoolmaster sets up a new school to the damage of an ancient school, and thereby the scholars are allured from the old school to come to the new, no action will lie. This, indeed, is a negative decision, for it only holds that, assuming such a right to exist, it is common to all men, and may be exercised by all, at all events where the exercise is bonâ fide.

(1) 13 C. B. 285.

(2) [1895] A. C. 587.

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The next case is *Levet's Case*, in 1593, which is thus reported in Cro. Eliz. 289: "Plaintiff an innholder in D. The defendant spake these words, 'Thy house is infected with the pox; and thy wife was laid of the pox.' Actionable, for it is a discredit to the plaintiff, and guests would not resort thither." The reasons given why the words were actionable are only intelligible on the assumption that the plaintiff had a right to carry on his business as an innholder without disturbance, for the common law has never, that I am aware, held that slander of a man's wife is an injury to the husband's reputation for which he may maintain an action: and both reasons are equally valid if a man has a right to carry on his trade without disturbance.

In *Garret* v. *Taylor* (1), which was decided in 1620, the statement of the cause of action was that "the plaintiff was a free mason, and used to sell stones, and had a lease of a stone-pit; that the defendant, to discredit and deprive him of the commodity of the said mine, imposed so many and so great threats on his workmen, and disturbed all comers, threatening to maim and vex them with suits if they bought any stone, whereon they all desisted from buying and the others from working." Upon this it was moved in arrest of judgment that the action lay not, "for nothing is alleged, only words, and no acts or insult, and causeless suits or fears are no cause of action. Sed non allocatur; for the threatening to mayhem and suits whereby they durst not work or buy is a great damage to the plaintiff, and his losing the benefit of his quarries a good cause of action." Here it may be said that, so far as the servants are concerned, the plaintiff had a right of action in the nature of a right of property arising out of the personal relation existing between the master and servant, and of the services to which he was thereby entitled; but how could the plaintiff have a right of action against another for threatening to maim and vex with suits third persons who came to buy, but who are not alleged to have entered into any contract to buy stone? If, however, we assume that the common law recognises in every man a right to carry on his trade without disturbance, the difficulty disappears.

In addition to the above cases there are many others scattered through the books where actions were maintained for compelling a man's servants or tenants by force or threats to depart from their service or tenure. I mention these to shew that I have not forgotten them; but I pass them over, as it may be contended that the actions were founded on the right arising from the personal relation of master and servant or of lord and tenant, and on the right to the services which thereby became due, and not on any acknowledged right to sue for a violation or disturbance of the right to earn a livelihood or carry on a business.

Next comes the very important case of *Keeble* v. *Hickeringill* (2), decided in 1706, in which Holt C.J. lays down in express terms the existence of a common law right to carry on a trade, or earn a livelihood, without hindrance or disturbance. The facts of the case have been too frequently referred to to need recapitulation. It will be sufficient to refer to those parts of the judgment which bear on the point under discussion. "He," says Lord Holt, "that

(1) Cro. Jac. 567.

(2) 11 East, 574, n.; 11 Mod. 74, 130; 3 Salk. 9; Holt, 14, 17, 19.

hindereth another in his trade or livelihood is liable to an action for so hindering him" (1); and again, "Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so?" (1); and again, "Now there are two sorts of acts for doing damage to a man's employment for which an action lies, the one is in respect of a man's privilege, the other is in respect of his property." And after discussing the first he goes on, "The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." "But" (speaking of disturbance of a decoy) "if a man doth him damage by using the same employment . . . . no action would lie, because he had as much liberty to make and use a decoy as the plaintiff. . . . Suppose the defendant had shot in his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing, and a wrong." (2) After referring to the schoolmaster's case in 11 Hen. 4, he adds, "But, suppose a man should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither, sure that schoolmaster might have an action for the loss of his scholars." (3)

This judgment was followed in 1809 in *Carrington* v. *Taylor*. (4) *Tarleton* v. *M'Gawley* (5) was decided in 1794. It was there held that an action lies against the master of a vessel for purposely firing a cannon at negroes, and thereby preventing them from trading with the plaintiff. In the judgment it was said, "Had this been an accidental thing, no action could have been maintained; but it is proved that the defendant had expressed an intention not to permit any to trade until a debt due from the natives to himself was satisfied." In this case it is clear that the plaintiff could have had no right of action against the master of the ship simply for firing at the negroes; but, when it was proved that the defendant fired at the negroes to prevent their trading with the plaintiff, it was held that a right of the plaintiff was violated, and a cause of action arose. Now it is not easy to see what right this could be except a right to carry on his trade without hindrance or disturbance.

In *Hannam* v. *Mockett* (6), decided in 1824, the facts were much the same as in *Keeble* v. *Hickeringill* (7), except that the birds were rooks which were driven from a rookery, and not wild fowl disturbed from a decoy. In that case Bayley J., giving judgment, says: "To maintain an action the plaintiff must have had a right, and the defendant must have done a wrong. A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action, or property that an individual has a special right to acquire. . . . A man in trade has a right in his fair chances of profit; and he gives up time and capital to obtain it. It is for the good of the public that he should. But has it ever been held that a man has a right in the chance of obtaining feræ naturæ, where he is at no expense in enticing them to his premises, and when it may be at least

(1) 11 East, 575, n.
(2) 11 Mod. 75.
(3) 11 East, 576, n.
(4) 11 East, 571.
(5) 1 Peake, N. P. C. 270.
(6) 2 B. & C. 934.
(7) 11 East, 574, n.

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questionable whether they will be of any service to him, and whether, indeed, they will not be a nuisance to the neighbourhood? .... *Keeble* v. *Hickeringill* (1) is distinguishable: First, wild fowl are protected by 25 Hen. 8, c. 11; Secondly, they constitute a known article of food, and a person keeping up a decoy expends money and employs skill in taking that which is of use to the public; Thirdly, it is a profitable mode of employing his land, and was considered by Lord Holt as a description of trade." In this judgment we find some uncertainty as to the ground of Lord Holt's decision in *Keeble* v. *Hickeringill*. (1) The right to carry on a trade or earn a livelihood without hindrance or disturbance is treated as a right to a fair chance of profit; and the keeping a decoy is referred to as being considered by Lord Holt as a description of trade; but the learned judge rather speaks as if *Keeble* v. *Hickeringill* (1) was decided on the strength of a right in the chance of obtaining feræ naturæ, where the man has been at expense in enticing them to his premises, as by a decoy; whereas Lord Holt expressly says in *Keeble* v. *Hickeringill* (1), "This action is not brought to recover damages for the loss of the fowl, but for the disturbance."

Twenty years later—namely, in 1844—came the case of *Gregory* v. *Duke of Brunswick* (2), in which it was suggested, but not decided, that hissing an actor maliciously is actionable.

In 1853 the leading case of *Lumley* v. *Gye* (3) gave rise to a discussion which even yet can hardly be regarded as settled. Crompton J. seems rather inclined to rest his judgment in that case on the foundation of a violation of a right analogous to the right arising from the relation of master and servant. Erle J. puts his judgment on a wider ground. "The answer," he says, "appears to me to be that the class of cases referred to rests on the principle that the procurement of the violation of the right is a cause of action, and that, where this principle is applied to a violation of right arising upon a contract of hiring, the nature of the service contracted for is immaterial." [The learned judge then quoted the judgment of Erle J. from the middle of p. 232 down to the middle of p. 234.] Coleridge J. took a much narrower view, and contended that the action for enticing away a servant was founded on the Statute of Labourers, and could not be extended to the case of a public singer. Whatever we may think of the force of Coleridge J.'s reasoning, it must, I think, be admitted now that, although the three judgments differed in the grounds on which they were put, the conclusion of the majority that Lumley had a good cause of action was right. At the present day, however, it will hardly be contended that the decision should be supported on the grounds taken by Crompton J. The point came before the Court of Appeal nearly thirty years later, in 1881, when *Bowen* v. *Hall* (4) was disposed of, and the majority of the Court there held that the decision in *Lumley* v. *Gye* (3) was correct, but that it was to be supported, not on the narrower ground taken by Crompton J., but on the broader ground on which it was based by Erle J.

Instances of the action for disturbing a man's right to earn his livelihood are rare, but they do exist even in modern times. Thus, in *Young* v. *Macrae* (5),

(1) 11 East, 574, n.
(2) 6 M. & G. 953.
(3) 2 E. & B. 216.
(4) 6 Q. B. D. 333.
(5) 3 B. & S. 264.

decided in 1862, Cockburn C.J. says: "If a man falsely and maliciously makes a statement disparaging an article which another manufactures or vends (although in so doing he casts no imputation on his personal or professional character), and thereby causes an injury, and special damage is averred, I am far from saying that an action might not be maintained." And it was actually so held in *Western Counties Manure Co.* v. *Lawes.* (1) It is true that these cases are sometimes referred to as being in the nature of slander of title. But it seems simpler to class them as instances of the violation of a man's right to carry on his trade without disturbance than to resort to a forced analogy to slander of title, which is, in truth, a violation of the rights of property, and not a violation of rights of reputation.

In *Riding* v. *Smith* (2), decided in 1876, the plaintiff, a trader carrying on business, brought an action founded on words uttered by the defendant, which led to loss of trade and customers by the plaintiff, defendant having stated that the wife of the plaintiff, who assisted him in his business, had been guilty of adultery. In giving judgment Kelly C.B. said: "It appears to me that if a man states of another, who is a trader earning his livelihood by dealing in articles of trade, anything, be it what it may, the natural consequence of uttering which would be to injure the trade and prevent persons resorting to the place of business, and it so leads to loss of trade, it is actionable." It is quite true that in this case the injury arose from words spoken of the wife, but the only right of the plaintiff said to have been infringed is the right to carry on a trade without disturbance, whether by word or deed. So, again, in *Quartz Hill Gold Mining Co.* v. *Eyre* (3), decided in 1883, it was held that an action will lie for falsely and maliciously, and without reasonable and probable cause, presenting a petition to wind up a company. Here it is difficult to see what was the right of the company which was infringed except the right to trade. It can hardly be said that any other right of property or any right of reputation, if such right can exist in a company, was infringed.

The *Mogul Case* (4), decided in 1889, is an illustration of what constitutes malice in these cases; but that a trader has a right to carry on his business without disturbance except in the way of fair competition is apparently accepted as undoubted law. Thus Lord Esher says: "Now a long line of cases has determined that every trader in the Queen's dominions has by law a legal right to carry on his trade according to his own will and judgment, and the law has decided that for some kinds of interference with that right the trader interfered with has a right of action." Turning again to the careful analysis of law in Sir William Erle's book, "I agree," says his Lordship, "with him (p. 13), that 'these propositions assume that a person has a right to do as he chooses with his own, whether labour or capital, within the limits set by law; that a right involves a prohibition against the infringement thereof; and that a prohibition involves a remedy for the violation thereof.'" In *Temperton* v. *Russell* (5), decided in 1893, the question arose whether there was a distinction between the claim for inducing persons to break contracts already entered into

(1) L. R. 9 Ex. 218.
(2) 1 Ex. D. 91.
(3) 11 Q. B. D. 674.
(4) 23 Q. B. D. 598.
(5) [1893] 1 Q. B. 715.

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with the plaintiff, and that for inducing persons not to enter into contracts with the plaintiff. Lord Esher held that there was not, for reasons which do not seem at all consistent with the theory that it is the making of a contract which gives each of the contracting parties a right in re against all the world. Lopes L.J. and Smith L.J. avoided the question.

Such being the state of the authorities, the question arises whether *Lumley* v. *Gye* (1) and *Bowen* v. *Hall* (2) are to be supported on the principle first applied by Erle J. in the former case to rights ex contractu, that the procurement of the violation of the right is a cause of action, or on the principle laid down by Lord Holt, that he that hindereth another in his trade or livelihood is liable to an action for so hindering him. I venture to think that Lord Holt's principle is to be preferred to that of Erle J., on the ground that the latter is anomalous and unnecessary, and at the same time both too wide and too narrow. It is anomalous, because in no other instance in the English law that I am aware of does a right ex contractu give rise to a right in rem. In no other case that I know of can two persons by agreement between themselves create an obligation binding on all the rest of the world. Of course, I am aware that a right arising from purchase in the narrower sense of the word is preceded by a right ex contractu; but in that case the right in rem does not arise directly from the making of the contract but from the fulfilment of it, and is in truth only a transfer of the already existing right in rem from the vendor to the purchaser, and is as much a binding obligation on the vendor as on the rest of the world. It is also anomalous, because, as Erle J. himself states, the right in re is there available against all the world except the co-contractor whose consent to the contract is supposed to have given birth to this anomalous right in rem. That this is so is plain from the judgment of Erle J., where he points out that on his principle damages will be recovered against the man who procures the breach of a contract which cannot be recovered against the man who actually breaks the contract he has himself made. Secondly, Erle J.'s principle is unnecessary, as is shewn by Sir William Erle himself in his book on trade unions (p. 13), where he says that "a person has a right to do as he chooses with his own, whether labour or capital, within the limits set by law; that a right involves a prohibition against the infringement thereof, and that a prohibition involves a remedy for the violation thereof." If this is so, and if, as Lord Esher points out in the *Mogul Case* (3), the acts complained of in *Lumley* v. *Gye* (1) and *Bowen* v. *Hall* (2) were acts in obstruction of the ordinary course of trade, and if, as I believe is the case, the right of the trader to do as he chooses with his own was violated in all the cases in which the plaintiff succeeded, it was quite unnecessary to discover a second violation of a right, since one is sufficient. I am not sure that I thoroughly understand the bearing of some of Lord Esher's remarks in the *Mogul Case* (3) upon *Lumley* v. *Gye* (1); but, if I correctly understand them, Lord Esher says in effect that the action of Gye in inducing Miss Wagner to leave Lumley's service was a disturbance of Lumley's right to carry on his business which might or might not have been justified, and that his method of inducing her to leave Lumley's service by

(1) 2 E. & B. 216. (2) 6 Q. B. D. 333.
(3) 23 Q. B. D. 598.

breaking her contract was only proof of malice, shewing that the disturbance was malicious and therefore not justifiable. Thirdly, Erle J.'s principle is too narrow. The reasons for this are given by Lord Esher in *Temperton* v. *Russell.* (1) The loss and inconvenience may be exactly the same, where it is not the fulfilment of a contract which is interfered with, but the continuance of a course of practice which is disturbed, as is shewn by this very case, where the loss and damage to the respondents are the same as if they had had a contract with their employer, with this difference only, that in the latter case they would have had some remedy, though perhaps not a very effective one, against their employer, while in the former case they have none. Moreover, it is difficult to see why the fact that the contract is not in writing when writing is required to give it validity, or not stamped when a stamp is necessary for the same purpose, should give immunity to a third person, who in all probability does not know whether it is in writing, or whether it is stamped or not. The contract theory, moreover, does not explain the numerous cases in which an action has been held to lie although there is no contract, as in *Levet's Case* (2), as in *Garret* v. *Taylor* (3) as far as the customers were concerned, as in *Tarleton* v. *M'Gawley* (4), and as in *Keeble* v. *Hickeringill.* (5) Would a person who maliciously induced an infant on coming of age to avoid a voidable contract be held liable? Again, the theory, which is based on breach of contract, goes too far, for in that case it would be actionable, apparently, for a man or woman to induce a girl to break off a contract of marriage, unless he or she could shew that there was such a relationship between him or her and the girl as to impose upon them the duty of giving her advice on the subject. The absence of any such action or of any reference to it in our books is the best proof that no such right exists. Again, it is actionable for a man to retain a servant in his employ after notice that he has left his former employment in breach of his contract, even where the second employer had no notice of the contract at the time of employing the servant, and even where the servant has left his employment voluntarily; would it be equally actionable to marry a woman after notice that she had broken her contract to marry another man?

Nor are the cases which are referred to by Erle J. very satisfactory. *Winsmore* v. *Greenbank* (6) may with much better reason be referred to the husband's marital rights which at the time that case was decided were looked upon as rights in re available against the whole world, and not as rights in personam available against the wife only. *Green* v. *Button* (7) may with as much reason be referred to the right of the plaintiff to carry on the business for which he bought the goods in question without disturbance, as to his right to have his contracts respected by the whole world except the other contracting party. *Sheperd* v. *Wakeman* (8) seems rather an action for injury to the reputation of the plaintiff than anything else.

A point has, however, been started that this right to carry on business without disturbance is confined to traders, and that there is no corresponding right

(1) [1893] 1 Q. B. 715.
(2) Cro. Eliz. 289.
(3) Cro. Jac. 567.
(4) 1 Peake, N. P. C. 270.
(5) 11 East, 574, n.
(6) Willes, 577.
(7) (1835) 2 C. M. & R. 707.
(8) (1661) 1 Sid. 79.

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in a workman to earn his livelihood by selling his labour without disturbance. Indeed, in the *Mogul Case* (1) Lord Esher expressly says that the right applies only to trade and to traders; but I find it very difficult to understand what his Lordship meant by this, inasmuch as in the same judgment he cites, apparently with approval, the expressions of Sir William Erle cited below to the contrary effect. Certainly actions of this kind are more frequently brought by traders than by workmen; but, undoubtedly, the principle is laid down in terms which expressly recognise the right of a workman to dispose of his labour by Lord Holt and Sir W. Erle. [The learned judge quoted the passage before cited from Sir W. Erle on Trade Unions, p. 12.]

It was asked by one of your Lordships, "If a cook says to her master, 'Discharge the butler or I leave you,' is that actionable?" With submission I say that it is, if the master does discharge the butler in consequence; and I hardly understand why it should not be. Ex concessis the butler has been interfered with in earning his livelihood and has lost his situation, and the circumstances shew no just cause or excuse why the cook should have induced her master to discharge the butler. The interference or disturbance is not violent, as if the cook had threatened to shoot her master if he did not discharge the butler at her request; but, no good cause or excuse being shewn, though many may be suggested, it is malicious. Suppose the cook had falsely told her master that the butler did not know his business, and the master had discharged him in consequence of what she said, would not that be actionable? Or is an action of slander in his calling the luxury of a trader, and not competent to a working man?

Another question put in the course of the argument was this: "Will an action lie if A., out of ill-will to B., induces C. not to leave him a legacy?" I answer, Certainly not, because there is no such recognised trade or profession as that of a legacy hunter, just as in *Hannam* v. *Mockett* (2) it was held that there was no such recognised trade as that of rook-dealer, while in *Keeble* v. *Hickeringill* (3) it was held that the action did lie because there was such a trade as that of a game-dealer or poulterer.

Bearing in mind the dicta of Lord Holt and Sir William Erle which have been already cited, and remembering how men earn their livelihood by almost insensible gradations, from disposing of their labour only, through disposing of goods which owe what value they possess solely to the labour which has been spent upon them, up to disposing of goods in which the labour spent upon them forms a continually decreasing portion of their value, it seems impossible at the present day to hold that there is one law for the comparatively rich trader, and another for the comparatively poor working man living by his labour; and I, therefore, answer the first part of the question put to us by saying that in my opinion Allen, in inducing their employers to dismiss the respondents from their employment, was guilty of a violation of their right to freely dispose of their labour without molestation, and that this is an actionable wrong, unless he can justify it by shewing that he had some lawful cause or excuse for what he did.

(1) 23 Q. B. D. 598. (2) 2 B. & C. 934.
(3) 11 East, 574, n.

Assuming that the plaintiffs had a right to dispose of their labour as they pleased, limited only by the equal right of the defendant to dispose of his labour as he pleased, the next question is, Was there any evidence to go to the jury of a malicious disturbance by the defendant of this right of the plaintiffs? In *Bromage* v. *Prosser* (1), decided in 1825, it was said that malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. In an ordinary action for words it is sufficient to charge that the defendant spoke them falsely. It is not necessary to state that they were spoken maliciously. This is so laid down in Styles, 392, and was adjudged upon error in *Mercer* v. *Sparks*. (2) The question of what is malice in these cases was much discussed in the *Mogul Case* (3), in which, although the Court was divided, the point at issue was not so much a question of law as a question of mixed law and fact, namely, what fell or did not fall within the description of lawful competition. Still, it will be advisable to quote from the judgment of Lord Bowen, which ultimately prevailed. [The learned judge quoted from the words "No man" on p. 614 down to "all trade" on p. 615.]

Now, in the present case, disregarding all questions as to whether Allen couched his inducement in the form of a threat or of advice, and as to whether he correctly or incorrectly reported to the employers what had taken place between himself and the boiler-makers, there remains the fact that Allen induced their employers to cease employing the respondents, not because the boiler-makers wished to do, or could do, the work on which the respondents were then employed, but because the respondents had been previously guilty of doing ironwork in Mills & Knight's yard. His motive, therefore, was not to secure the work they were then doing for the boiler-makers, but to punish the respondents for what they had previously done; and, according to Edmonds and Halkett, when they spoke about it not being right to visit Mills & Knight's sins on the Glengall Iron Company, Allen said that the boiler-makers would be called out from any yard the respondents went to, and that they (the respondents) would not be allowed to work anywhere in London river. Now, although according to the principles of the *Mogul Case* (3) the action of Allen might have been justified on the principles of trade competition, if it had been confined to the time when the respondents were doing ironwork, and were therefore acting in competition with the boiler-makers, it appears to me that as soon as he overstepped those limits, and induced their employers to dismiss them by way of punishment, his action was without just cause or excuse, and, consequently, malicious within the legal meaning of that word. And this, indeed, seems to be the view of some of the defendant's witnesses themselves, as, for instance, Jackson. If this is not malicious, I ask where the line is to be drawn. Might Allen lawfully have carried out his threat, and with impunity have procured the dismissal of the respondents from every yard in London by way of punishment, and not in the way of competition?

I, therefore, answer your Lordships' question in the affirmative.

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(1) 4 B. & C. 247. (2) (1586) Owen, 51; Noy, 35.
(3) 23 Q. B. D. 598.

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NORTH J. My Lords, the plaintiffs are members of the trade union of shipwrights, who, in London at any rate, have been in the habit of doing ironwork on both iron and wooden ships. The appellant Allen is the London branch delegate of the trade union of boiler-makers and iron and steel ship builders, who contend that all this ironwork of ships should be done by them, the shipwrights being confined to woodwork; and they have succeeded in getting their views adopted in some yards. In the works of the Glengall Iron Company the shipwrights do the woodwork only, and the boiler-makers the ironwork. The plaintiffs had often worked for and were valued servants of that company, but for some months before April 12, 1894, they had been working for Mills & Knight on the ironwork of a big iron ship. On that day they returned to the service of the Glengall Company to do certain work on the *Sam Weller*, and this was woodwork only. The employment of shipwrights on woodwork is a thing of which the boiler-makers do not ordinarily complain: it is work which the latter are not trained or competent to do, and they do not attempt it.

At the Glengall works the plaintiffs were, according to the recognised practice in the trade, taken on for the job, meaning that in ordinary course their employment would continue until the work on the *Sam Weller* was completed, or so nearly so that their services were no longer required; but there was no contract that they should be employed until the work was finished, or for any definite period. The service was determinable at any time at the will of either party.

The number of boiler-makers employed at the Glengall works was about 100, the shipwrights being about one-third only of that number. On April 12 the boiler-makers shewed dissatisfaction at the plaintiffs getting work there; and one of them, Elliott, telegraphed for Allen as the branch delegate. On the next morning Allen came, and was informed that the boiler-makers objected to the re-employment of the plaintiffs, they having previously worked on iron at Mills & Knight's, and had made up their minds to leave rather than continue working where they were. Allen told his men they must not leave without orders; that if they took the law into their own hands they would lose the benefits of their union, and be fined also for leaving work; and he forbade their leaving until he had tried to bring about some settlement; and the men obeyed him. Allen thereupon went to see Mr. Halkett, the Glengall Company's manager. At this time there were only three courses possible: (1.) the boiler-makers might have withdrawn their objection to work with the plaintiffs; or (2.) they might have left their work; the 3rd alternative being to get the plaintiffs discharged. No attempt was made by Allen to bring about the first; if that mode of removing the difficulty had been entertained at all his influence should have been brought to bear, not on Halkett, but on the members of his own society; but he did not try to induce them to change their minds on that subject. The second alternative, of the boiler-makers leaving work, was not desired by Allen or his men. They wanted not to go on strike but to stay, and Allen warned them of the consequences if they did leave before he had tried to get Halkett to do what would obviate the necessity of their striking. The only other alternative was to get rid of the plaintiffs: and it was to bring this about, if possible, that Allen went to see Halkett. He told him that, as

the plaintiffs had been guilty of doing ironwork at Mills & Knight's, all the iron-men would leave unless the plaintiffs were discharged. Halkett complained that this was very arbitrary, as the Glengall Company had never employed shipwrights on ironwork; but Allen persisted, and added that his men would cease to work in any yard the plaintiffs went to; they would not be allowed to work anywhere on the London river; that it was difficult to know men, but the plaintiffs were known men, and would be followed; and the same action would be taken wherever they got employment. The withdrawal of the iron-men would have stopped the Glengall Company's business altogether; and Halkett said it would not do to have the business of the yard upset just for the sake of two men, and thereupon very reluctantly told the foreman Edmonds, in Allen's presence, to discharge the plaintiffs that night, and get two other shipwrights in their place, and not employ them again; adding that, if Edmonds knew of any shipwrights having been working on ironwork elsewhere when he was engaging men, he was for the sake of peace and quietness not to employ them. The plaintiffs accordingly were discharged, not because there was any ground, even from the boiler-makers' point of view, to complain of what the plaintiffs were then doing, but to "punish" them for what they had previously done at Mills & Knight's. It is necessary to bear this in mind, as there is a misprint in Kennedy J.'s summing-up at p. 169 of the Appendix. The plaintiffs' evidence was clear upon this, and it was not challenged on cross-examination; and Allen himself admits (p. 110, line 11) that the boiler-makers did not fall out with what the plaintiffs were doing then, but what they had been doing. Allen goes so far as to say that he did not know whether the plaintiffs were discharged; that he never recommended their discharge nor hinted at it; that he did not ask or wish that the plaintiffs should be discharged, and never had such a thing in his mind; but this is absolutely inconsistent with his acts and conduct from first to last. The result of the action taken and threatened on behalf of the boiler-makers would, if their power equalled their desire, be that the plaintiffs would never be able for the future to carry on their lawful trade, even of working in wood, in any place where boiler-makers were employed: and that too, not that their rivals in trade, the boiler-makers, might get the work instead, but that the shipwrights' work, which the plaintiffs would otherwise have done, might be given to two shipwrights who had not made themselves obnoxious to the boiler-makers.

These being the facts proved, and damage to the plaintiffs therefrom being also proved, the question is whether Allen's interference was justifiable or not—whether he has infringed any right of the plaintiffs. [The learned judge quoted the passage before cited from Sir W. Erle on Trade Unions, p. 12.] In *Reg.* v. *Druitt* (1) Lord Bramwell says: "No right of property or capital is so sacred or so carefully guarded by the law of the land as that of personal liberty. That liberty is not liberty of the body only; it is also a liberty of the mind and will, and the liberty of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as is that of his body." [The learned judge quoted the judgment of Lord Bowen in the *Mogul Case* (2) from the words "what then" on

(1) 10 Cox, C. C. 592.

(2) 23 Q. B. D. 598.

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p. 613 of 23 Q. B. D. to the end of the page.] These statements seem to me exactly on the same lines as were adopted by Lord Holt in *Keeble* v. *Hickeringill* (1), where, after saying that there were two sorts of acts doing damage to a man's employment for which an action lies, he said that the second "is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood,—there an action lies in all cases. But if a man doth him damage by using the same employment, as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's, and that had spoiled the custom of the plaintiff no action would lie, because he had as much liberty to make and use a decoy as the plaintiff." I am not aware of any decided case challenging the validity of that decision, nor even of any reported observation adverse to it. In the *Mogul Case* (2) Lord Coleridge spoke of it as an extreme case, but in the same case he said: "I do not doubt the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who suffered injury from them. The question comes at last to this: What was the character of these acts, and what was the motive of the defendants in doing them?" (3) This is precisely what the plaintiffs contend for. One other passage I desire to quote from the decision of the Court of Appeal in *Bowen* v. *Hall* (4): "Merely to persuade a person to break his contract may not be wrongful. . . . . But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." These cases seem to me to establish that every man has a right to carry on his lawful trade or employ his industry as he thinks fit; understanding by his right to do it that the law will secure him in the enjoyment of it, and will protect him against any improper interference or molestation in so doing, but that mere competition by rivals in trade who have an equal right to carry on a like business is not such interference or molestation.

The proposition was laid down boldly by the appellant's counsel that, if a man commits an act which is not itself illegal or tortious, it cannot be rendered actionable by reason of its having been done with a malicious intent. I do not understand the proposition. A malicious act has been described in hundreds of cases, both civil and criminal, as a "wrongful act done intentionally without just cause or excuse"; the element of wrongfulness is essential, and an act which ex hypothesi is not wrongful or tortious cannot in accurate legal phraseology be a malicious act. If the proposition intended is that an act itself legal cannot be rendered actionable by being done from a wrong motive, such as spite or ill-will or vindictiveness, or merely to vex or annoy, I deny that the proposition is sound in law or universally true. It is much too large. Each case must be considered separately. In many cases, no doubt, the proposition is correct. A man is not liable to an action for sinking a well which drains his neighbour's, even though the sole object be not to get water for himself, but to spite his neighbour by depriving him of his necessary supply.

(1) 11 East, 595, n.
(2) 21 Q. B. D. 544; 23 Q. B. D. 598.
(3) 21 Q. B. D. at p. 552.
(4) 6 Q. B. D. at p. 338.

A man may lawfully drain his own land, even if his sole object be vexatiously to prevent another from having the benefit of an overflow he has previously enjoyed. Numerous other illustrations might be given. But there are many cases in which the existence of a wrong motive, or malice, in the popular meaning of the word, does render that actionable which in its absence would not be so. *Gibbs* v. *Pike* (1) was an action for wrongfully registering as a judgment under 1 & 2 Vict. c. 110, an Order of the Court of Chancery. Baron Alderson says (2): "How is registering the order an injurious or wrongful act to any one? It is clear it is not. It causes no damage; it is no injurious act, and therefore, in order to enable the plaintiff to maintain this action it is incumbent on him to shew that this act, in its nature not wrongful, has become so in consequence of its having been done through a bad motive. For this purpose, and in order to render the act wrongful and injurious, he is bound to add to the fact of registering the order the absence of reasonable and probable cause, and a malicious motive for doing so." I pass over without comment actions for libel or slander, as Lord Coleridge's remarks thereon in *Bowen* v. *Hall* (3) seem to me of some weight. In *Ratcliffe* v. *Evans* (4) Lord Bowen, in giving the judgment of the Court of Appeal, says (5): "That an action will lie for written or oral falsehoods, not actionable per se nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully or intentionally done without just occasion or excuse, analogous to an action for slander of title." In *Bradford Corporation* v. *Pickles* (6) Lindley L.J. says (7): "The only question a court of law or equity can consider is whether the defendant has a right to do what he threatens and intends to do. If he has, he cannot be interfered with, however selfish, vexatious, or even malicious his conduct may be." But the learned judge's very next words shew that he was dealing with the particular case before him, and that in his view there are cases in which an improper object or motive does make an otherwise lawful act actionable. An action for malicious prosecution is a good instance of such cases. Unless the plaintiff can prove the absence of reasonable and probable cause for the prosecution, the right to prosecute is absolute, and the motive is just as immaterial as it would have been if the prosecution had succeeded. Even when such cause is shewn not to exist, the defendant may still succeed if he can prove that he acted without malice, e.g., that he did bonâ fide believe there was reasonable cause to prosecute. The plaintiff cannot claim to be protected against a prosecution where there is reasonable and probable cause; or even where there is no such cause, but there is an absence of malice. If such cause is absent, and there is malice, the prosecution is wrongful; and the one vital question there is as to the intention of the prosecutor, the state of his mind: did he act with malice or not? If he did, the action against him will succeed; if not, it will fail. While

(1) 9 M. & W. 351.
(2) 9 M. & W. at p. 362.
(3) 6 Q. B. D. 333.
(4) [1892] 2 Q. B. 524.
(5) [1892] 2 Q. B. at p. 527.
(6) [1895] 1 Ch. 145.
(7) [1895] 1 Ch. at p. 159.

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on this subject, I crave in aid the decision in the *Mogul Case* (1) itself. The ratio decidendi there was that the acts of the defendants were all within the limits of allowable trade competition; but the case would have been very different if the defendants' acts had been without just cause or excuse. I have quoted Lord Coleridge's and Lord Bowen's language on the subject; and the same idea is expressed in some of the other speeches, and appears to pervade many of them. It seems to me, if I may say so with deference, that it would have been useless to consider at length in that case whether the defendants had just cause or excuse for what they did, if the plaintiffs would have had no right of action for interference with their trade, even though the defendants had been acting maliciously, and no just cause or excuse had existed.

Applying these principles to the present case, the question is whether Allen's interference with the employment of the plaintiffs was with just cause or excuse or not. If it was merely in the legitimate exercise of his own rights, without malice, the *Mogul Case* (1) applies, and there is no cause of action. But the plaintiffs also have a right to the protection of the law against improper interference with their trade; and Allen cannot justify such interference, unless it is with just cause and excuse, i.e., in the lawful exercise of rights of his own. If his action was in excess of this, and was without just cause or excuse—if it was done to injure the plaintiffs or their employers, or to benefit Allen and his men at the expense of the plaintiffs, otherwise than by lawful trade competition—then there was a wrongful act, giving to the plaintiffs a right of action. Allen denies, no doubt, that he had any personal feeling against the plaintiffs, whom he did not know; but then he denies that he wanted them discharged, or even knew that they were discharged! Assuming, however, that there was no hostile feeling by Allen against the plaintiffs as individuals, there seem to me ample materials in the evidence from which the jury might find a desire on the part of the branch delegate to prevent the further employment of, and to injure, the two well-known shipwrights who defied his union; and also to injure the business of the Glengall Company, by forcing them not to employ the plaintiffs, as they had a right to do. In the *Mogul Case* (2), Fry L.J. pointed out, as a material circumstance, that there was there no evidence of express malice, or of any activity of the defendants against the plaintiffs, except as rival and competing shipowners: that the defendants did not aim at any general injury of the plaintiffs' trade, or any reduction of them to poverty or insolvency, but only desired to drive them away from particular ports, where the defendants conceived that the plaintiffs' presence interfered with their own gain, and that the damage to be inflicted on the plaintiffs was to be strictly limited by the gain which the defendants desired to win for themselves. The state of facts disclosed in the case now before your Lordships is very different from that referred to by the Lord Justice. As to what the true result of the evidence is, I refrain from expressing any opinion. That is for the jury to decide, and your Lordships have not asked the opinion of the judges about it.

There was one other matter strongly pressed by the appellant's counsel, upon which I desire to add a few remarks. It is not disputed that the cases of

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(1) 23 Q. B. D. 598; [1892] A. C. 25. (2) 23 Q. B. D. at p. 625.

Lumley v. *Gye* (1) and *Bowen* v. *Hall* (2) establish, so far as the Courts below are concerned, that wrongfully inducing the breach of a contract of service for a fixed period may give ground of action; but it is said this cannot be so when the service is at will only. It is true that in each of those cases the engagement was for a defined period; while in the present case it was not. But it was an engagement for the job, according to the recognised practice of the trade, though determinable earlier by notice; it was intended to last until the work was done, and would in fact have so lasted but for Allen's intervention. Its continuance was assured by its being the common wish and for the mutual advantage of the employer and employed, just as much as if there had been an engagement for a definite time; and one can readily divine what the answer of a layman would be who was told that the law made a distinction between the two cases, and the officious intermeddling of Allen would be justifiable in the one but not in the other. In the present case I think that the layman's censure would not be deserved, and that no such legal distinction exists. There are numerous cases shewing clearly that a wrongful interference between employer and employed, from which damage ensues, gives a cause of action, even where the employment is at will only, and not for a fixed period. In *Thompson* v. *Ross* (3), a case of seduction, Bramwell B. said: "In the ordinary case of a person living in a house as a member of a family, it is very reasonable to hold that the relation of master and servant (determinable at will) exists between the parties." In *Bennett* v. *Allcott* (4) the action was by a farmer for trespass and the debauching of his grown-up daughter; and this passage occurs in the judgment: "Neither is it material whether the servant be or not hired for a year, or whether she has any wages, it being sufficient that she is a servant de facto." If it is said that cases arising from seduction are anomalous, *Evans* v. *Walton* (5) was a case of enticing away a daughter where an action for seduction could not have been brought, and the long judgments of Bovill C.J. and Willes J. and Montague Smith J. are full of law upon this point. In the course thereof the Chief Justice said: "No authority is to be found where it has been held that in an action for enticing away the plaintiff's daughter a binding contract of service must be alleged and proved; but there are abundant authorities to shew the contrary." Willes J. said (6), speaking of father and daughter: "if she is in his service whether de son bon grè or sur retainer, he is equally entitled to her services and to maintain an action against one who entices her away. Assuming that the service was at the will of both parties, like a tenancy at will, the relation must be put an end to in some way before the rights of the master under it can be lost. As a question of fact, was the daughter in the service of her father at the time the cause of action arose?" And Montague Smith J. (7), after referring to the contention that there must be proof of some binding contract of service, said: "It appears to me, however, that there is abundant authority for holding that there was an existing relation

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(1) 2 E. & B. 216.
(2) 6 Q. B. D. 333.
(3) (1859) 5 H. & N. 16.
(4) (1787) 2 T. R. 166.
(5) (1867) L. R. 2 C. P. 615.
(6) L. R. 2 C. P. at p. 622.
(7) L. R. 2 C. P. at p. 623.

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of master and servant here, by interfering with which the defendant was guilty of an actionable wrong. But for the defendant the service would have remained uninterrupted." The Lord Chief Justice and Willes J. also cited from the Year Books several cases of a different class, shewing that a master has a right of action for an assault on his toll-gatherer, labourer, or other servant by which his services were lost to the master, even though the man was not a servant on retainer, but at will only.

These authorities shew that the real question is whether Allen did or did not wrongfully interfere with the existing relation between employer and employed; and the duration of the employment is immaterial, except on a question of amount of damages, which is not now under consideration. It is not in dispute that he did in fact intervene while that relation was subsisting; that but for such interference it would have continued uninterrupted until the job was completed; and that in consequence of such interference, and by means of the pressure brought to bear upon the employer, that relation was summarily determined the same evening. It was said that Allen merely left it to Halkett to adopt whichever of two courses he thought best; but the same thing might be said of the highwayman's option to the unarmed traveller. It was also said that if Allen had not appeared upon the scene at all the boiler-makers would have left; and, to induce them to return, Halkett would have been driven to discharge the plaintiffs. But assuming this conjecture to be well founded, it is no defence to an action against Allen for a wrongful act to say that the same end might have been arrived at by the adoption of other means which would not have been open to the imputation of illegality.

For these reasons I answer your Lordships' question by saying that there was evidence of a cause of action fit to be left to the jury, namely, of an interference by the appellant with the plaintiffs in the exercise of their lawful trade without just cause or excuse.

WILLS J. My Lords, the first step towards answering your Lordships' question is to state the facts which might legitimately be inferred from the evidence given by the witnesses for the plaintiffs.

In consequence of the form of your Lordships' question, I have confined myself entirely to the evidence given on behalf of the plaintiffs. Perhaps, however, I may be permitted to say that amongst the evidence given for the defendant there are passages which would, in my opinion, add to the materials proper to be left to the jury on behalf of the plaintiffs.

The plaintiffs were employed by the day as shipwrights on certain work in the shipbuilding yard of the Glengall Iron Company. Other work was being done in the same yard and on the same ship by boiler-makers. The work which was being done by the plaintiffs was not work to which the boiler-makers laid claim, nor had the boiler-makers any cause of complaint against them, except that they had a short time previously in another shipyard done work of a class which the boiler-makers wished to secure to themselves, to the exclusion of shipwrights. The defendant was the delegate of the boiler-makers' union, and known as filling that position to the managing director of the Glengall Company. The defendant went to the managing director and spoke to him about the employment by the Glengall Company of the plaintiffs. So far the

evidence is distinct and categorical. The details of the conversation, however, are not given with precision, and probably not very exactly remembered. There was, however, abundant evidence that the defendant said, not only that the boiler-makers would be called out, but that he would call them out, if the Glengall Company continued to employ the plaintiffs, and that he, as well as the other boiler-makers, had made up his mind that they should be called out, not only of the Glengall Company's yard, but of any other yard on the Thames where the plaintiffs might get work. There is also evidence that he gave as a reason for this action that it was difficult to know whether particular shipwrights had offended against the boiler-makers by getting work which the boiler-makers wished to secure for themselves, that the plaintiffs had been found out, and that wherever they went the same course would be pursued with regard to them. In other words, there is evidence that he said that he and the other boiler-makers were determined to make an example of the plaintiffs, and, if possible, to deprive them of the means of living, as a punishment to them and a warning to other shipwrights who might be disposed to compete with the boiler-makers. There was, of course, a disclaimer, which is to be gathered from the evidence of the plaintiffs' witnesses, by the defendant of any personal ill-will towards the plaintiffs as individuals; but the jury were entitled to judge for themselves of the sincerity of that disclaimer, and to come to the conclusion that the defendant as well as his friends had a spiteful feeling towards the persons, whoever they might be, who had transgressed against their interests, and presumed, although not boiler-makers, to compete with them for particular kinds of work, and that it was that spiteful feeling which induced the boiler-makers and the defendant, as one of them and as representing them, to go to the employers on the errand in question. The employers hereupon refused to allow the plaintiffs to work for them any longer, which but for the action of the defendant they would have done, and each plaintiff suffered in consequence pecuniary damage. I believe I have correctly stated the substance of the evidence; and if such a state of facts constitutes an actionable wrong, it appears to me that your Lordships' question must be answered in the affirmative. If it does not, the answer must be in the negative.

That the object the defendant had in view was the punishment of the plaintiffs for having done acts which were perfectly lawful, but which the defendant believed it was for the advantage of the boiler-makers to prevent them from repeating, or others from doing, seems to me absolutely beyond controversy, though perhaps I ought rather to say that there is abundance of evidence to that effect. As a means to an end which he believed would be advantageous to the boiler-makers he, beyond all doubt, meant to inflict upon the plaintiffs as much mischief as lay in his power, and there is ample evidence that it was the interference of the defendant which induced the employers to refuse to continue the employment of the plaintiffs. To prevent a working man from earning his daily bread in any of the places where alone he was likely to find the opportunity of so doing is to cause him as direct and as great a damage as can well be inflicted upon him. There is no doubt that this was the defendant's avowed object.

The act done by the defendant was, therefore, one both calculated and intended to inflict upon the plaintiffs great loss and suffering. It does not,

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however, follow that it is actionable. There is no case exactly like this present one, and some discussion of principle is therefore necessary.

There are, of course, acts which are unmistakable violations of definite legal rights, as to which no controversy can arise, and as to which motive cannot be material. A good motive will not make them the less actionable; a bad motive will not make them the more so.

There are, on the other hand, acts which a man has a definite legal right to do without any qualification, and which therefore cannot be actionable. Here, again, motive is immaterial. A good motive does not increase, a bad motive does not diminish, the right to do them. If no interference with ancient lights, for instance, be involved, a man may erect upon his own land a building which may ruin his neighbour's industry exercised upon the adjoining land. No action could be maintained, though it were demonstrated that his only purpose in making the erection was to spite and damage his neighbour. Illustrations might be multiplied to any extent. Equally any right given by contract may be exercised as against the giver by the person to whom it is granted, no matter how wicked, cruel, or mean the motive may be which determines the enforcement of the right. It is hardly too much to say that some of the most cruel things that come under the notice of a judge are mere exercises of rights given by contract—a fact illustrated perhaps by some of the decisions upon bills of sale.

In such cases it is, I apprehend, perfectly clear law that the addition to the statement of the cause of action of the epithet "malicious" and proof that the thing done was done from the worst of motives will not make the matter complained of actionable: *Bradford Corporation* v. *Pickles*. (1) Certainly no one is more keenly alive than myself to the mischief that would be caused by any relaxation of this rule.

But there is a large class of cases which belong to an intermediate category, and in which it can neither be said that the thing done by the defendant gives an indisputable and unqualified right of action no matter what the circumstances, nor can it be said that the defendant has an absolute and unqualified right to do it whatever the consequences to others. These are exercises of personal freedom which are perfectly legitimate in themselves, but which cannot be indulged in without interfering with rival exercises of personal freedom by others. One must give way to the other, and questions immediately arise as to which is to prevail, and whether the diminution of either by the exercise of the rival freedom gives rise to a right of action. It is an exercise of a man's personal freedom to shout and make a noise, and if nobody else is interfered with he may shout as loud and as often as he likes. But it is an exercise of another's personal freedom to pass his time in peace and quiet. Each must submit in some degree to the other. The man who loves quiet must make some allowance for his neighbour's freedom to shout. The shouting man must pay some respect to his neighbour's peace, and if he goes beyond what is reasonable he commits an actionable wrong. Here and in many cases the test of whether that which in itself and so far as its mere nature goes is not unlawful constitutes a cause of action or not is degree. There are other cases in which the motive becomes

(1) [1895] A. C. 587.

the test. A man may write or speak to a person having a common interest in the subject-matter of the communication with the utmost freedom about another man, and may say things most damaging to that other, so long as he does it honestly. But if he makes the opportunity the cloak for spite and ill-will he creates a cause of action. A man may prosecute another even without reasonable cause, so long as he does it honestly, and no action will lie against him. Let him do it out of spite or from a discreditable motive, and he is liable. The thing he does is in each case the same, so far as the very thing is concerned of which complaint is made, and its consequences to the sufferer are the same. But if it be done honestly there is no action; if it be done dishonestly or out of spite there is an action.

The notion, therefore, that the same thing may be unlawful or may be lawful, may or may not constitute a cause of action, according as it is or is not done out of spite and ill-will, or from some improper motive, is very well known to our law. There seems to be on principle no difficulty or impropriety in applying it to the present case. Surely, to do your best to take away another man's bread, and to succeed in doing so, may very well be a cause of action, if it be done out of pure spite and to punish a rival for having competed with you and your friends for work which he has as good a right as yourself or they to secure; whereas, if it be done fairly and honestly in the exercise of legitimate competition and without the intention of injuring a particular individual, except in so far as he may necessarily be injured by the course of conduct adopted for reasons not involving the desire to punish and distress him, it would be none. The *Mogul Case* (1) shews that competition may legitimately carry both individuals and combinations of persons very far in the attempt to keep others out of the field of gain. But there is surely a difference between saying, "I will advise those I can influence not to work with anyone who will compete with them for a particular class of work," and saying, "I will advise the boiler-makers, and as far as I can I will take means myself to punish men who have once competed with them and me for work which they and I are determined that none but men of my own class shall have." I see nothing unreasonable in saying that in the one case the defendant has done nothing more than he has a right to do, and that in the other he has gone beyond his rights and committed an unlawful act.

Keeble v. *Hickeringill* (2) is an authority of great importance in this connection. There was nothing unlawful in itself in the firing of guns by the defendant on his own land, but it was done, not for the protection of his own interests nor in the exercise of any absolute and unqualified right, but merely in the exercise of a personal freedom and for the express purpose of damaging the plaintiff. It is true that "maliciously" as then used in declarations in actions upon the case certainly did not necessarily imply that the act was done for that purpose, but the question arose upon a motion in arrest of judgment, and it is clear from one report (3) that it was treated as a case in which the act had been done for the mere purpose of damaging the plaintiff, as, after a verdict, the Court was clearly entitled to do. If it were not so understood the case

(1) [1892] A. C. 25.

(2) 11 East, 574, n.

(3) 11 Mod. 74.

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would be even stronger, for it would then shew that an act wilfully done, which was calculated to do mischief to the plaintiff's property, though not done with that motive, would support the action, provided the defendant could not shew a legal right to do it. A case in which the act complained of is really done out of spite must be a stronger case than that of a disturbance merely without any definite legal justification. Lord Holt puts the case of what he calls "a malicious act done to a man's occupation or way of getting a livelihood" on the same footing, and I can hardly doubt, looking to the instances he gives and the cases he cites, that he meant to use the word "malicious" in the larger and non-natural sense given to it by generations of lawyers. Bowen L.J., in the *Mogul Case* (1), following *Bromage* v. *Prosser* (2) and several earlier cases, treats it as equivalent to an allegation that the act was intentional, likely to do harm to another, and done without just cause or excuse. I believe that the more the subject is examined the more correct his interpretation of the term will be found to be. It is difficult, without refreshing one's memory at the ancient fountains, to appreciate the wealth of abusive epithets bestowed by the old pleaders upon acts complained of. "Wicked," "malicious," "deceitful," "fraudulent," "covinous," are the commonplaces, and will be met with in nearly every declaration in an action upon the case, in Brown's Vade Mecum, Herne's Pleader, and most of the old books of entries. Aston's Entries is the only book of early precedents I know from which they are occasionally absent. They are applied indiscriminately to the loss of a package by a carrier, to the disturbance of a pew, to riding a hired horse too hard, to a refusal by an innkeeper to accommodate a guest, to interference with a watercourse, as well as to the withholding of a disputed debt; in the last case possibly at times with more truth than in the other instances I have mentioned. In the majority of cases no one ever thought of proving them, but the ordinary plea was not guilty; and these epithets negatived the existence of just cause or excuse. They, on the other hand, were negatived if just cause or excuse was established; and so the epithet "malicious" came into general use as a sort of anticipatory assertion that no just excuse existed. In some instances, as I have shewn, it was necessary to prove that the act deserved the epithet. Even then, however, it was only because in particular cases, such as defamation upon a privileged occasion, the only way of negativing just excuse was by shewing an improper motive. In the present instance, however, it is unnecessary to consider these refinements, for there was clearly evidence that the act of the defendant was done out of a desire to punish the plaintiffs, and the mere fact that there may have been over and above the malicious purpose and motive a hope of some remote advantage in the way of giving an object lesson to others cannot make it the less an act of spite against the plaintiffs. Neither the *Mogul Case* (3) nor any other says that the promotion of one's own interest will justify any and every means by which that end can be accomplished, and the utmost that can be said about self-interest as a justification for doing mischief to others is that it is one of the circumstances to be taken into con-

(1) 23 Q. B. D. 614. (2) 4 B. & C. 255.
(3) [1892] A. C. 25.

sideration in determining whether there is or is not just excuse for the wilful infliction of loss upon others.

It appears to me, therefore, to follow from Lord Holt's statement of the law that in cases of the kind under discussion, where there is no absolute and unqualified right to be protected from the thing complained of, in order to support an action two conditions must be satisfied. 1. The act must be malicious; 2. It must cause to the plaintiff some damage of a kind which the law recognises. One instance of such damage is the destruction or deterioration of property: see *Hannam* v. *Mockett.* (1) Another consists of hindering a man in getting his livelihood, which obviously ought to stand upon the same footing in this respect as property. Lord Holt's authority is very great, and I cannot find that *Keeble* v. *Hickeringill* (2) has ever been doubted. In *Ibbotson* v. *Peat* (3) it was treated as undoubted law.

I have only to add a few remarks upon the three or four cases which are supposed to bear more directly upon the present question, and which are said by the appellant to have been erroneously decided. It is not necessary to do so at length, because it is clear that their correctness is under review upon the present occasion.

Lumley v. *Gye* (4) was decided forty-four years ago, and, with the exception of the judgment of Lord Coleridge in the Court of Appeal in *Bowen* v. *Hall* (5), I am not aware of any subsequent recorded expression of judicial opinion adverse to its principles, or even of any unfavourable criticisms in legal literature beyond some not very definite hint that it may be open to reconsideration contained in a note to *Ashby* v. *White* (6) by Willes J. There are no doubt weighty arguments in the dissentient judgment of Coleridge J., but they are directed to shewing that the narrow grounds upon which the judgments of Crompton and Wightman JJ. proceeded were erroneous and hardly touch the broader question of principle which I have attempted to discuss. Even were it otherwise, cases constantly occur in which there is much to be said on both sides, and when a case like *Lumley* v. *Gye* (4) has passed for nearly half a century into the regular current of authority, where it cannot fail to have influenced many a decision, there is so much mischief done in the way of unsettling the law by overruling it that it should not be lightly disturbed. With the greatest respect I cannot say that Lord Coleridge's criticisms upon it appear to me to be well founded. He seems to think that there is something unreasonable in making a cause of action depend in any case upon the motive with which the thing complained of is done, and further that such a doctrine would be an anomaly in our law. I cannot see anything unreasonable or impracticable in the proposition. I am dealing, ex hypothesi, with cases in which things have been done as to which one man has no absolute definite legal right to do them and another has no absolute definite legal right that they should not be done. Why should they not be protected from suit, if done honestly and fairly and under circumstances which should not prevent

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(1) 2 B. & C. 934.
(2) 11 East, 574, n.
(3) 3 H. & C. 644.
(4) 2 E. & B. 216.
(5) 6 Q. B. D. 333.
(6) 1 Sm. L. C. (4th ed.) 222.

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a reasonable man from doing them, and why should they not give rise to an action when they are done under such circumstances that no right-minded man, reasonably careful of what he owes to others, would think of doing them? In cases of actions for injury by negligence one constantly has to ask a jury whether what has been done is or is not what a man reasonably careful of the lives, or limbs, or property of other people ought to do. So far from the proposition being anomalous, it seems that the very case Lord Coleridge mentions as presenting a fallacious analogy really depends upon the same principle. Why is it that privileged communications are protected though defamatory? Surely, because if honestly made, it is better for the world at large that the individual who suffers in consequence of them should be without remedy than that freedom of speech should, under the circumstances which give rise to the privilege, be checked. But it is not for the public advantage that he should be without remedy where the occasion is abused out of spite or other improper motive, and accordingly if this exists the action lies. If it does not, the action does not lie. To go back to the phrase that all defamation is in presumption of law malicious, that privilege sets to rest that presumption, and that malice in fact again establishes it, is to take refuge in words. The substance is that, under identical circumstances, the same thing is actionable or not according as it is shewn or not shewn that it is done from a motive which the law does not admit as an excuse for mischief caused to another, and which lawyers have for centuries designated by that unfortunate epithet "malicious."

The case of malicious prosecution presents a still closer illustration of the principle which Lord Coleridge so severely criticises, and which was adopted by the majority of the Court in *Bowen* v. *Hall.* (1) No one can deny that when every other element of the cause of action is clear, whether the action will or will not lie depends upon the motive with which the accuser made or persisted in the charge, and upon nothing else.

The common law is elastic so long as its principles are observed; and to me it seems that this case should be decided upon principles alike sound, old, and of wide application, and that if the matter complained of was certain to cause mischief, was done with no lawful justification or excuse, but out of spite and a desire to punish, the action is maintainable. I cannot see anything contrary to sound sense, good morals, or public policy, or even inconvenient in saying that upon an occasion like that with which we are dealing the right of action may depend upon a motive.

Except in the judgment of Erle J., *Lumley* v. *Gye* (2) does not seem to have been dealt with on any broad grounds of principle. The analogy or want of analogy between the relation of an opera singer to the lessee and stage manager of the theatre and that of a servant to a master seems to have been the principal topic of discussion. Even if that case were wrongly decided it would not follow that the action would not lie in the present case. There was no allegation in the declaration that the plaintiff carried on the business of making money by providing theatrical or operatic exhibitions. But I do not pursue this matter, as I have no desire to deal with the present inquiry in any narrow or technical spirit. The true view of *Lumley* v. *Gye* (2) is, in my

(1) 6 Q. B. D. 333. (2) 2 E. & B. 216.

opinion, that the facts bring it within the principle laid down by Lord Holt in *Keeble* v. *Hickeringill.* (1)

Bowen v. *Hall* (2) was, I think, rightly decided, and in one respect only does it appear to me to be open to criticism. The Master of the Rolls treats the purpose of benefiting the defendant at the expense of the plaintiff as necessarily in legal phraseology a malicious purpose. Again, with the greatest deference I am obliged to say that this seems to me to be going a great deal too far; and I think the question whether the act complained of was malicious would depend upon whether the defendant had in pursuing his own interests done so by such means and with such a disregard of his neighbour as no honest and fair-minded man ought to resort to.

This observation applies also to some parts of the judgments in *Temperton* v. *Russell.* (3) It follows from what I have said before that that case was, in my opinion, rightly decided, though it certainly does not necessarily govern this case. The distinction between inducing people to break contracts and inducing them not to enter into contracts cannot, in my opinion, be ignored; but it appears to me that it is one of circumstance rather than one of essence. If I am right in the view I take of the present case, it is because Lord Holt was right in saying that a malicious act done to a man's way of getting his livelihood is a cause of action. It does not seem to me to matter what the particular act is, so long as it is not one which the person doing it has a definite legal right by contract, or by the common or statute law to do, no matter what may be the consequences to others, and the nature of the act is only material as one of the elements from which the jury are to judge of the conduct and motives of the doer.

For these reasons I am of opinion that your Lordships' question should be answered in the affirmative.

GRANTHAM J. My Lords, as the answer to the question your Lordships have just put to us must depend on the evidence given at the trial, it is necessary to state briefly what that evidence was.

The two men, Flood and Taylor (the plaintiffs), were shipwrights, who, after passing through their apprenticeship of seven years in the Glengall Iron Company's works, were fully competent to work both on wood and iron work in repairing or building wood or iron ships. They belonged to the Shipwrights' Provident Union, and had been in regular work from the time they had been out of their apprenticeship, a period of about two years. During a part of that time (four months) they had been employed at Messrs. Mills & Knight's shipyard, Nelson Dock, Rotherhithe, and had while there been employed on both wood and iron work on wooden and iron ships without any molestation or complaint. Having finished their work at Mills & Knight's on April 11, 1896, they were taken on, on April 12, at the Glengall Iron Company's dock, to work on a ship called the *Sam Weller* on the terms of a usual recognised practice, that they should be kept on the job till the work slackened, when the men are gradually discharged till the job is finished. When the job is finished the men

(1) 11 East, 574, n. (2) 6 Q. B. D. 333.
(3) [1893] 1 Q. B. 715.

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work on another ship if in dock, or wait for one to come into dock, or, if they like, they seek work elsewhere. The men are not paid either by the day or by the piece, but by the job, and are allowed to draw a certain sum per day (about 8s.) on account of their work, and the plus, or balance of their wages earned, is not ascertained or paid to them till the job is finished, and the plus, or balance, is then divided amongst all the men according to the time they have worked. Though at Mills & Knight's they had worked at ironwork on iron ships, at the Glengall Company's dock they had only worked on wood.

On April 13, without any warning, they were discharged at a minute's notice by the foreman of the Glengall Iron Company (Mr. Edmonds), who said that they were good men, and told them that he was sorry to discharge them, that it was not his fault, that he could not employ them anywhere at the yard while the iron-men worked there, for if he did all the iron-men would come out and strike, and their business would be ruined, as the coming out of the iron-men would stop their business altogether, the iron-men there mentioned being the men belonging to the boiler-makers' union, of which defendant was a delegate. After they were thus discharged they got no work till April 17, when they were employed at docking a ship for a few hours (not regular ship-wrights' work), and since then, though not altogether unemployed, they had not got employment as readily as before, and in many yards where previous to that they were given work they were not put on at all.

It must be admitted, therefore, that these men had, subject to a right of dismissal on the part of the employers, an engagement on a continuous employment which, had it not been put an end to by the defendant's interference, would have continued for a long period. Now let us see what was the evidence of malice in the mind of the defendant, relied on by the plaintiffs, and what was the cause of action, if any, fit to be left to the jury.

The evidence shews that the defendant, being a delegate of the boiler-makers' union, was determined to punish the plaintiffs, and to prevent their getting work anywhere else on the London river (the district in which they always worked), because of the work they had done on iron ships at Mills & Knight's. He called on Mr. Halkett, the managing director of the Glengall Iron Company's works, on the 13th, and said to him that unless Flood and Taylor were discharged from their employment that day all the ironworkers belonging to his society would leave off work, and that he would withdraw the iron-workers from all the works of the Glengall Iron Company wherever that work was. He said these men, the plaintiffs, were known men, i.e., marked men, that it was so difficult to get them known, but these men were known, and wherever they were employed the same action would be taken; and as the ironworkers and boiler-makers' union men were by far the most numerous (were about 100 to 22 of the shipwrights employed on the Glengall Iron Works), the masters would have no option but to discharge them, as they could not carry on their business without the men of the boiler-makers' union. Mr. Halkett stated that, from what defendant said, he understood that he had only to hold up his finger and all the men would knock off, and that he would call the men out if these men were not discharged, and he believed that the threat would be enforced unless he submitted and discharged the plaintiffs at once; and he also said that the defendant came to dictate to him, and when he remonstrated with

him on the injustice it was to his firm, the defendant said, to shew doubtless he wished to injure the plaintiffs only and not the Glengall Iron Company more than any other employers, that the men would be called out from any yard they (the plaintiffs) went to, and they would not be allowed to work anywhere on the London river. Defendant said also the men were a bad lot, and of no principle whatever, which, as Mr. Halkett said, he knew to be untrue. Surely no better evidence could be found of intimidation to the employer and a determination to injure the employed, and, therefore, evidence of malice of the worst form towards the plaintiffs.

The right of the plaintiffs to work as they had done, and the custom for them to do it, was proved beyond a doubt, and also that it was comparatively recent that the boiler-makers had been accustomed to work on general ironwork as well as on boilers. That is the evidence in the case on the part of the plaintiffs, without touching the evidence of the defendant at all. In my judgment, there was ample evidence of malice as it stood; but can any one say that there was no evidence? And if, therefore, there was some evidence, it was the duty of the judge to call for an answer on the part of the defendant, and when we come to the evidence given by the defendant's witnesses, whatever doubt there was as to malice was clearly removed. The defendant admitted that the plaintiffs were doing nothing wrong at the time they were discharged, nor had they been doing anything wrong during the time they were in the employ of the Glengall Iron Company. By "wrong" defendant meant nothing contrary to his own ideas, or to any of the rules of the defendant's society. Mr. Knight, the general secretary of the defendant's union, and Mr. Jackson, the chairman of the union, also both stated in their evidence that they had never given any authority to Allen to threaten any employer in any way whatever, and that they knew nothing of his action in the matter till they were themselves served with a writ in the action. They also said that Allen had no power to withdraw men from any work on which they were engaged; and, although it was his duty to report what he did as a delegate in the district to the executive council in relation to this matter, he had never done so, and that when shipwrights, like the plaintiffs, who had been working on iron, had ceased to do so, neither the union nor the union men, even according to their own rules, had any right whatever to interfere with them, or to refuse to work with them, when they were working on other work.

Was this malicious conduct or was it not? Can it be said that it was only carrying on their own trade by a trade union as they liked and for their own interests? It was not their own trade, but the plaintiffs' trade they were interfering with, for the boiler-makers were not capable of doing the work the plaintiffs were doing; and as to the maliciousness of the conduct of defendant, the motive of the defendant being the desire to punish and to ruin for an imaginary or alleged wrong in the past is about as strong a proof of malice as can be found in any case reported in our law-books.

How can it be said that to act spitefully against a person and to make false statements as to his own position and authority for the purpose of forcing some one else to do that person an injury are not evidence of malice? Can it be said that by the law of England the plaintiffs had no legal right in their employment—no right to be protected from malicious interference or molestation in

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that employment, and that the employer could be made to turn them out against his own will by a malicious action as against them, without giving them a right of action against the person so acting maliciously—that the law will protect a person in his trade of killing wild ducks (*Keeble* v. *Hickeringill* (1)), or of supplying the natives of Africa with gunpowder and cheap gin (*Tarleton* v. *M'Gawley* (2)) from malicious interference and molestation in those trades, but will not protect the labouring man from similar malicious conduct, which deprives him of the means of earning his livelihood? Or can it be said that it will protect a person from malicious interference with his work if he is under a contract that can only last a day or a week or for some limited time, but it will not protect him from the same malicious interference in reference to that employment which would but for the interference last for months or years? This right to work as he likes is as much a personal right of the individual as is his right not to be molested in his person or in his property. It is a right of personal liberty. No one would deny that it would be illegal to forcibly prevent him from working in his garden; why is it not illegal, therefore, by a wrongful (i.e.) malicious act to prevent him working for hire for some one else who wishes to employ him in his garden? It is not contended on behalf of the plaintiffs that all malicious conduct on the part of a third person which is injurious to another is actionable, nor that the mere inducement of another to break his contract or engagement would of itself without malice be actionable but it is contended that malicious conduct is actionable when it is a direct interference with a right of the person injured, and not merely a malicious exercise of a right of the person guilty of malice. In other words, can it be said our law is such that, it being admitted that the foundation of capital is labour, you will protect capital and the employment of capital, but will decline to protect that labour which creates it?

There is, it must be remembered, a great difference between so managing your own business to make a profit for yourself that you indirectly cause loss to another, and the directly injuring another that profit may accrue to yourself. In my judgment, therefore, the inducing the plaintiffs' employers to discharge them by threats of injury to those employers if they did not discharge them was a good cause of action, because it was done maliciously, and that there was ample evidence of malice surely no one can doubt.

Were it not for the importance of the case and the unusual circumstances which have led to Her Majesty's judges being summoned to the House of Lords, I should content myself with the above observations; but as so much time has been spent in discussing various authorities I feel bound to make some reference to them, though I cannot help saying that almost the whole of the time occupied by the counsel for the appellant (the defendant) was taken up in endeavouring to explain away the decisions that they quoted, and they did not bring forward a single case which could be called an authority in their favour. All the cases seem to me to be unanimously in favour of the principle relied upon by the plaintiffs, and the reason for there being no case directly upon the point is not far to seek. It is this, that until the influence of the trade unions became as great as it is now no workman was or could be exposed to such an

(1) 11 East, 574, n. (2) 1 Peake, N. P. C. 270.

injury as we are now discussing, because no men or body of men would previously have had the power to dictate to their employers as they can now.

Let us, therefore, see what is the law to be gathered from the various authorities that have been so freely quoted during the argument of this case.

First, we find in the Year Books the cases that have been called the Schoolmasters' Cases (29 Ed. 3, 18 (1) and 11 Hen. 4, 47). In the former case the boys were maliciously frightened and thus prevented from going to school, and so it was held an action would lie, but not in the latter case, because the injury only resulted from the competition arising from the defendant setting up a rival school; in other words, an action would lie where there was a malicious interference with a man's trade, though no contractual interest was interfered with or involved. In Comyn's Digest, title "Action on the case," A, we find: "In all cases where a man has a temporal loss or damage by the wrong of another he may have an action on the case to be repaired in damages." That is this case. And again, title "Misfeasance, A 6": "If a man threaten the tenants of another whereby they depart from their tenures action will lie," and this is so says Holt C.J. in the next case, even if they are tenants at will (it may be said in this case that the plaintiffs were workmen as well). In *Keeble* v. *Hickeringill* (2), note to *Carrington* v. *Taylor* (3) Holt C.J. says: "Suppose the defendant had shot on his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing." Applying that judgment, therefore, to this case, it seems to be strictly in point. If the defendant had merely persuaded the master to give employment to the men of his union no action, but as he maliciously forced him not to employ the plaintiffs to injure them, action will lie. Then how completely the next remark of Holt C.J. applies. He says: "I am of opinion that this action for shooting on his own land to frighten ducks off the plaintiff's decoy doth lie. It seems to be new in its instance, but not new in the reason or principle of it" (exactly as in this case), "for the employment of his ground for the purpose of a decoy is profitable to the plaintiff as is the skill and management of that employment," &c. "It is as lawful to use art and skill to seduce ducks into a decoy," &c. "And when a man uses his art and skill to take them to dispose of them for his profit, that is his trade, and he that hinders another in his trade or livelihood is liable to an action," &c.

Is not the work of the plaintiffs their "art and skill and trade" just as much as that of the decoy man, and why are they not therefore to be protected as much as he? Then, again, Holt C.J. says: "Where a violent or malicious act is done to a man's occupation, possession, or way of getting a livelihood, there an action will lie in all cases, but not if the injury is by using the same employment." And again in another case (4) Holt C.J. says: "The third sort of damage is damage to a man's property, as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused. That a man is put to expense is without doubt, which is an injury to his property, and if that injury is done to him maliciously it is reasonable he shall have an action to

(1) [The only case at all of this class on the page referred to is trespass for disturbing a fair. *Ideo quære.*—F. P.]

(2) 11 East, 574, n.

(3) 11 East, 571.

(4) *Savile* v. *Roberts*, 1 Ld. Raym. 374, 378.

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repair himself"; and later on he says: "From above it follows that the damage is the ground of action." In *Bowen* v. *Hall* (1) it was held that if the persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law a wrongful act, and therefore an actionable act if injury ensues from it.

Then on the question of whether there must be an existing contract of time that is interfered with, see what is said in *Blake* v. *Lanyon* (2), where it was held that the plaintiff who employed his men to work by the piece could bring an action against another master who persuaded the plaintiff's men to work for him before the job was finished. There, only persuasion made the defendant liable. Here in this case the job was not finished when the defendant forced the master to dismiss them, and it was not persuasion by which the mischief was done, but malicious conduct and falsehood on the part of the defendant. *Hart* v. *Aldridge* (3) is very similar, and *Green* v. *Button.* (4)

In *Savile* v. *Roberts* (5) Holt C.J. held that an action will lie for a malicious indictment which puts the party to expense though the charge it contains neither scandalises him nor endangers his personal liberty or security. And in *Green* v. *London General Omnibus Co.* (6) it was held that an action would lie against defendants' company for wilfully and maliciously obstructing another omnibus belonging to another company. They did what was called "nursing" the rival omnibus. Erle C.J. said the Court unhesitatingly found that the action was maintainable because it was done maliciously. The plaintiff had in that case no contractual right to run his omnibus. The learned counsel for the appellant in this case, apparently feeling the force of the authority against them, endeavoured to shew that the decision was founded on some injury or interference with a public highway; but the closest perusal of the case shews there was no foundation whatever for that suggestion.

Lumley v. *Gye* (7) was decided no doubt on the ground that the plaintiff had a contract for the exclusive services of Johanna Wagner for a specific period; but Crompton J. says (8): "suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or another party who owes money to his rival and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party, I am by no means prepared to say that an action could not be maintained"; and later on he says the malicious injury is the gist of the action.

Again, in the *Mogul Steamship Co.* v. *McGregor* (9), which was relied upon by the appellants, the judgments of all the learned Lords are distinctly in favour of the contentions of the plaintiffs in this case. Lord Watson says: "I apprehend to substantiate their claim the appellants must shew either that the object of the agreement was unlawful or that illegal methods were resorted to in its prosecution;" and again: "it has not been suggested that the respondents used misrepresentation or compulsion for the purpose of obtaining the object of their combination." Here both are used by the defendant. Lord Field says:

(1) 6 Q. B. D. 333.
(2) (1795) 6 T. R. 221.
(3) (1774) 1 Cowp. 54.
(4) 2 C. M. & R. 707.
(5) 1 Ld. Raym. 374.
(6) 7 C. B. (N.S.) 290.
(7) 2 E. & B. 216.
(8) 2 E. & B. at p. 230.
(9) [1892] A. C. 25.

"Of course it is otherwise, as pointed out by Lord Holt, if the acts complained of, although done in the way or under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another for ill-will to him and not the pursuit of lawful rights." Bowen L.J. (1) says: "Now intentionally to do that which is calculated in the ordinary course of events to damage and which does in fact damage another in that other person's property or trade is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong." In that case it was held that the defendants had just cause or excuse, because what they did was only in reference to carrying on their trade in their own way; but here the evidence is exactly the reverse. And again Bowen L.J. says: "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause." With regard to the suggested difficulty that might arise in the application of this principle to domestic servants, I see none whatever. If one servant simply says to her master she will leave if another does not, no action would lie, but if she, from malicious motives, says, "I will force every servant to leave your service if you don't get rid of your butler," and because the master cannot get on without her he does discharge the butler, I see no reason why an action should not lie, provided damages were sustained. In conclusion, I will only mention *Bradford Corporation* v. *Pickles* (2), which is an instructive case relied on by the appellant, because it shews the class of cases in which no action would lie. What the defendant did there was to do something on his own property which he had a right to do, though the doing it would and did injure the plaintiffs, and he was acting maliciously towards them; but it was never suggested that if the defendant had gone off his own property or had interfered with the plaintiffs' own property he would not have been liable.

Having shewn, therefore, that the principle of law which was applied in deciding this case by the learned judge who tried it at Nisi Prius, and by the judges of the Court of Appeal who confirmed his judgment, and also by the learned judge and the Lords Justices who tried and decided the case of *Temperton* v. *Russell* (3), is the same that has been the guiding principle of all the judges who have considered the question from the earliest time to the present day; and if, as I believe is the case, six of my learned brethren agree with the views that I have expressed, there is an almost overwhelming consensus of opinion as to what the common law of England has been and is on this question. I do not speak of the law of Scotland, for I am not familiar with it if it differs from ours; but the judges of the Court of Chancery have, as far as I know, on the few occasions on which they had to determine it, agreed with the law as laid down by the common law judges. This, as far as I am aware is, however, the first time that the question has been brought up to the House of Lords, and I can only trust that a law which has been acted on for so many years, and

(1) 23 Q. B. D. 613. (2) [1895] A. C. 587.
(3) [1893] 1 Q. B. 715.

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which is manifestly for the welfare of working men, will not be found to be bad law.

For the reasons above given, my answer is in the affirmative.

LAWRANCE J. (1) My Lords, I am of opinion that the question proposed by your Lordships must be answered in the affirmative.

I think that the principles on which this case is to be decided are to be found in the dicta of Holt C.J. in the case of *Keeble* v. *Hickeringill* (2): "(1.) He that hinders another in his trade and livelihood is liable to an action for so hindering. (2.) Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." The conditions necessary to support an action are, I think, well stated by Lord Bramwell, in his judgment in the *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) as "trespass, violence, force, fraud, or breach of contract, or any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy, or any act the ultimate object of which is to injure the plaintiffs, having its origin in malice or ill-will to them." It seems to me that this definition includes those exceptions which have been grafted on the more general propositions of Holt C.J., namely, the case of fair competition, if without malice (see the judgments of Lords Field and Hannen), of which the *Mogul Steamship Co.'s Case* (3) is the principal example; and, secondly, the case of the lawful use of a man's own property, as decided in the case of the *Bradford Corporation* v. *Pickles*. (4)

There are numerous cases decided both before and after the case of *Keeble* v. *Hickeringill* (2), all of which rest upon the doctrine above stated: the *Abbot of Denesham's Case* (5), where it was held actionable to prevent persons from coming to the plaintiff's fair; the case in Year Book 11 Hen. 4, 47, where the same doctrine is re-asserted but distinguished, the distinction (namely, that a fair is a franchise and that a private school is not) being very material in the latter case, where the only act complained of was setting up a rival school, but not being material in the former, where the right of the plaintiff to be undisturbed in holding the market is no greater than that of a tradesman to be undisturbed in exercising his trade. In 9 Hen. 7, 8, it was held actionable to disturb a man's tenants at will, and to cause them to leave their tenancies; and in *Garret* v. *Taylor* (6) an action was held to lie against a man for threatening workmen and customers, and thereby preventing them from resorting to the plaintiff's quarry.

Since the decision of *Keeble* v. *Hickeringill* (2) many cases are to be found. *Tarleton* v. *M'Gawley* (7) was an action against the master of a ship for maliciously intending to hinder and deter negroes from trading with the plaintiff by firing cannon at them, whereby the plaintiff lost his trade. *Carrington* v. *Taylor* (8), which re-affirms the principle of *Keeble* v. *Hickeringill* (2);

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(1) Read by Grantham J. in Lawrance J.'s absence.
(2) 11 East, 574, n.
(3) [1892] A. C. 25.
(4) [1895] A. C. 587.
(5) 29 Edw. 3, c. 18.
(6) Cro. Jac. 567.
(7) 1 Peake, N. P. C. 270.
(8) 11 East, 571.

Ibbotson v. *Peat* (1), which is to the same effect; *Young* v. *Hichens* (2), in which the plaintiff had inclosed fish in a net when the defendant disturbed the fish and prevented their capture. Held that no action would lie in trespass, as the fish were not reduced into possession, but that action in case for disturbance would have lain.

These cases, as well as numerous others, avowedly rest upon the principle of *Keeble's Case* (3); but there is another class of cases which seem to me to be referred more satisfactorily to the principle of that case than to any other, such as the *Western Counties Manure Co.* v. *Lawes' Chemical Manure Co.* (4), where Lord Bramwell thus states the law applicable to cases of defamation of a man's goods: "It seems to me, however, that where a plaintiff says, 'You have without lawful cause made a false statement about my goods to their comparative disparagement, which false statement has caused me to lose customers,' an action is maintainable; . . . . on the general principle, therefore, an untrue statement disparaging a man's goods published without lawful occasion and causing him special damage is actionable."

In *Thorley's Cattle Food Co.* v. *Massam* (5) an injunction was granted against the defendant restraining him from publishing an advertisement stating that he was alone possessed of the secret of compounding Thorley's Food for Cattle, and from issuing a circular warning his customers against the plaintiffs, who were seeking to foist on the public an article which they pretended was the same as that manufactured by the late Joseph Thorley. The Court held the circular and advertisement contained untrue representations calculated to injure the plaintiffs in their trade, and that the issue ought to be restrained.

Riding v. *Smith* (6) was an action brought by the plaintiff charging the defendant with a slander on his wife, who assisted him in his business, whereby certain persons had ceased to deal with him. Held, that the action was maintainable. It seems difficult to see on what principle this case could be decided except on the doctrine of *Keeble* v. *Hickeringill* (3), as being a malicious interference with the plaintiff in the carrying on of his business, and Holt C.J. especially refers to such cases: "Why otherwise are scandalous words spoken of a man in his profession actionable, when without his profession they are not so? They do not effect any damage, yet are they mischievous in themselves; and therefore, in their own nature productive of damage, and therefore an action lies against him. Such are all words that are spoken of a man to disparage him in his trade that may bring damage to him, though they do not charge him with any crime that may make him obnoxious to punishment, as to say a merchant is broken, or that he is failing or is not able to pay his debts."

The case of *Lumley* v. *Gye* (7), which was much discussed during the hearing of the present case, seems to me to throw but little light upon the question now to be decided, except that for the first time it established the proposition that a plaintiff who had made a contract with another was entitled to recover damages from a third person who had maliciously persuaded that other person

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(1) 3 H. & C. 644.
(2) (1844) 6 Q. B. 606.
(3) 11 East, 574, n.
(4) L. R. 9 Ex. 218.
(5) (1879) 14 Ch. D. 763.
(6) 1 Ex. D. 91.
(7) 2 E. & B. 216.

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to break his contract; the only principle on which this conclusion could be based being, I think, that it was a malicious interference with the plaintiff's mode of carrying on his business. It also decided that there must be a binding contract of service between the servant and his employer in all actions for maliciously persuading a servant to quit his employment.

Bowen v. *Hall* (1), which was another case of an action brought by a person who had contracted with others against the defendants, who had persuaded them to break their contracts, was decided expressly on the authority of *Lumley* v. *Gye* (2), and scarcely differs in principle from that case.

I think that the true principle on which both these cases rest is not whether the relation of master and servant existed between the plaintiffs and the persons with whom the contracts were made, but upon the doctrine of *Keeble's Case* (3), that the plaintiffs, having entered into contracts in the course of their business, and those contracts being broken by the malicious interference of the defendants, they were prevented from carrying on their business in a profitable manner, and suffered damage in consequence.

In *Temperton* v. *Russell* (4) no question arose as to the position of the parties with whom the contracts had been made and the plaintiff. They were contracts made in the usual course of trade, and the action was brought against the defendants for maliciously causing the parties to the contracts not to fulfil their obligations to the plaintiffs under such contracts. It was held that the action was maintainable, and that the right of action is not confined to contracts in the nature of personal service. The direction of Collins J. is valuable as containing a clear definition of malice. He said: "Now, in my judgment, it is perfectly clear law, that to induce a person who has made a contract with another to break that contract in order to hurt the person with whom it has been made, to hamper him in his trade, or to put undue pressure on him, or to procure some indirect advantage for the person himself, to induce another to break a contract for any of those motives, is, in point of law, to do it maliciously; therefore, in this case, if you are of opinion that the plaintiff has satisfied you that any of the defendants had induced any of the parties to break his contract with the plaintiff, of the existence of which he was aware, in order to hurt the plaintiff in his trade . . . . and if his object in doing that was by hurting him in his trade to compel him to do something which he did not want to do . . . . that would be 'maliciously' in point of law, and a course of action would be established."

Such being the decisions in the principal cases relating to the subject-matter of the present action, the question arises as to whether the present case is brought within any of those principles. In order to determine that question it is necessary to ascertain what is the proper inference to be drawn from the evidence produced at the trial.

The evidence may, I think, be thus briefly stated. The defendant was the district delegate of a trade union called the United Society of Boiler Makers and Iron Ship Builders, whose headquarters were at Newcastle. Certain members

(1) 6 Q. B. D. 333.
(2) 2 E. & B. 216.
(3) 11 East, 574, n.
(4) [1893] 1 Q. B. 715.

of the union were employed by the Glengall Iron Company at Millwall, of which Charles Halkett was the managing director, and John Edmonds the foreman. The plaintiffs, who were members of the Shipwrights' Provident Union, were employed by the Glengall Company to work in a certain ship on which repairs were being done, and at the time at which the matters complained of took place they were engaged in doing woodwork upon the said ship, the boiler-makers being employed in the same ship to do the ironwork. The plaintiffs had previously worked in the yard of the firm of Mills & Knight, and had there been employed in doing ironwork, but no such work was done by them in the Glengall Company's yard. The men belonging to the boiler-makers' union working at the Glengall Company's yard were unwilling to continue their employment if the plaintiffs were continued on the work at the ship; not because the plaintiffs were then doing ironwork, but because they had done so at Mills & Knight's some months before. They communicated with the defendant as their delegate upon the subject, and he, in consequence of such communication, went to the yard where the plaintiffs and the men belonging to the boiler-makers' union were employed. According to his own account the defendant saw the men's representative, Elliott, who said the men complained and threatened to leave their work if the plaintiffs were continued in their employment. He told him that if the men did strike it would be at their own risk, and that he would see as far as his influence was concerned that they would be deprived of all benefit from the society, and be fined in addition, if they left their work. After his interview with the men's representative the defendant saw both Halkett and Edmonds, and to both he stated that the men would strike if the plaintiffs were continued at their work. Acting under the pressure of this threat the managing director, in order to avoid loss of time in the repair of the ship, discharged the plaintiffs from their work, and this action was brought to recover damages for the loss of their employment.

No one can, I suppose, doubt that if the defendant had acted merely as the delegate and mouthpiece of the men, and had stated to the Glengall Company the determination of the men to strike (if such had been the fact), he would have been guilty of no actionable wrong; but it appears to me to be strong evidence of malice to tell the Glengall Company that the men were about to strike when he had himself informed the men that not only would a strike not be permitted by the union, but that the men would be fined if they were to adopt that course. By reason of that fraudulent statement he induced the company to discharge the men, and, therefore, in my judgment, brought himself under the principle of the cases above referred to, namely, "of having done an act the ultimate object of which was to injure the plaintiffs, having its origin in malice and ill-will to them."

It is to be observed that this action differs from all the cases which were cited at the hearing of the appeal, inasmuch as it is brought by the men who were discharged for the disturbance of their employment, and not by the masters for the loss of their service. Had the latter been the case it would have been necessary to have proved the existence of a contract of service before the master could sue; but in this case a contract between the men and their masters could make no further difference except so far as it might enhance the damages, and regulate the amount to which the plaintiffs would be entitled, or

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so far as it might be an indication of malice, if it were shewn that the defendant knew of the existence of such a contract.

In this case the damages to the men were but small, as they were able to get employment shortly, but the right to bring the action would not depend on the existence of a contract.

It seems to me that the case was properly left to the jury by Kennedy J., and the jury having found that the defendant was actuated by malice (of which there was, in my judgment, ample proof), the respondents are entitled to succeed on this appeal.

WRIGHT J. My Lords, in my opinion your Lordships' question ought to be answered in the negative.

In order to answer it there are, as it seems to me, three, and only three, questions which must be considered. The first is whether, apart from malice, there is evidence of any cause of action; the second is, whether and in what sense malice is shewn; the third is, whether and in what (if any) cases a person can be liable to an action for doing with a malicious motive that which he might lawfully do without such a motive. There are no other questions, because it was ruled at the trial that there was no evidence of conspiracy or intimidation or breach of contract, and the judge was not asked to leave to the jury any issue as to those charges, or as to violence or coercion or fraud, or any other illegal conduct.

The first question may be thus stated: Does a plaintiff, by proving that a defendant has wilfully procured persons to refuse to make or renew contracts with the plaintiff in the way of his trade or employment, and that damage has directly resulted, prove any wrong or injuria? I am not sure that such a contention has been raised apart from malicious motive. Certainly no authority has been cited in its support (apart from malicious motive), and it is negatived impliedly in *Lumley* v. *Gye* (1), and expressly by the Judicial Committee of the Privy Council in *Rogers* v. *Rajendro Dutt.* (2) In *Lumley* v. *Gye* (1) the point did not directly arise, because there the breach of an existing contract had been procured; but each of the judges who then held that the action lay did so expressly on the ground that there was an existing contract. Crompton J. says that in the previous cases "the question as to there being or not being a binding contract of service in existence at the time seems to have been regarded as the real question." Erle J. says: "The right of action in the matter arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed." Wightman J. says: "It was undoubtedly, primâ facie, an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so." And it seems plain that, in the numerous ancient cases relating to the seduction of labourers, whether brought at common law or under the Statute of Labourers, which are cited by Coleridge J., the points which were argued would have been mostly immaterial if the doctrine now in question had been recognised.

(1) 2 E. & B. 216. (2) 13 Moo. P. C. 209, 237, 241.

In *Rogers* v. *Rajendro Dutt* (1) the very point directly arose in relation to trade, and was decided. There the superintendent of a port directed his pilots not to continue to employ the plaintiff's tug. The plaintiff recovered damages in the Supreme Court of Calcutta, but on appeal the judgment was reversed in the Privy Council, and it is laid down that "the foundation of every action of tort, apart from the question of malice, is an act wrongful, and which may be qualified legally as an injury. . . . It is essential to an action in tort that the act complained of should under the circumstances be legally wrongful as regards the party complaining, that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests is not enough." This decision is cited as an authority by Bowen L.J. in the *Mogul Case*. (2)

The second question is, whether and in what sense there was evidence of malice. Since there was not otherwise any wrong or injuria, it follows that there could not be malice in the ordinary legal sense of that term, as compendiously stating the wilful infringement of a legal right or breach of a legal duty without matter of legal justification or excuse: upon which may be cited *Bromage* v. *Prosser* (3), per cur.; *McPherson* v. *Daniels* (4), per Littledale J.; *Ferguson* v. *Kinnoull* (5), per Lord Brougham and Lord Campbell; *Lumley* v. *Gye* (6), per Crompton J.; *Reg.* v. *Ward* (7), per Blackburn J.

These and other authorities shew that in general wherever the term "malice" or "maliciously" forms part of a statement of a cause of action or of a crime, it imports not an inference of motive to be found by the jury, but a conclusion of law which follows on a finding that the defendant has violated a right and has done so knowingly, unless he shews some overriding justification. A striking illustration is to be found in the law of murder. In *R.* v. *Oneby* (8) it was resolved by all the twelve judges to the effect that it was for the Court to direct the jury whether there was malice or not, according to the facts found or to be found by the jury. They pointed out that in all the once numerous special verdicts in case of murder there was no instance of a finding by the jury on the question of malice. So in the latest instance of such a special verdict, *Reg.* v. *Dudley*. (9) So in libel or malicious prosecution. Though a jury should think that a defendant in an action for a libel intentionally published by him had a bonâ fide and reasonable belief that he was acting on a legal ground of privilege, still if in law the privilege did not exist there is legal malice. In an action for malicious prosecution, if there were a special verdict finding that the defendant did not think that there was any ground for prosecution, the conclusion of malice in law would be inevitable without any express finding of malice by the special verdict.

The only kind, therefore, of malice which can be suggested in the present case is malice in its popular sense, importing a malicious motive, spite, and ill-will. It seems to me impossible to say that there was not evidence fit to be

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(1) 13 Moo. P. C. 209, 237, 241.
(2) 23 Q. B. D. at p. 613.
(3) 4 B. & C. 247.
(4) (1829) 10 B. & C. 263.
(5) (1842) 9 Cl. & F. at pp. 303, 321.
(6) 2 E. & B. 216.
(7) (1872) L. R. 1 C. C. 356.
(8) (1727) 2 Ld. Raym. 1485.
(9) (1884) 14 Q. B. D. 273.

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left to the jury of malice in this sense. The mere demeanour of the defendant as a witness is often the best indication of motive which the nature of the inquiry admits, and is sometimes cogent.

Then if there was not in the present case any cause of action in the absence of malicious motive, can the addition of a malicious motive create an injuria? Can that which in the absence of malicious motive it is lawful to do wilfully and with the knowledge that it will cause damage, as in *Rogers* v. *Rajendro Dutt* (1), become unlawful and constitute a cause of action when done from an indirect or malicious motive? That question is one of equal consequence and difficulty, and it was expressly left open in *Rogers* v. *Rajendro Dutt* (1), though I think not so much as a general question as in relation to a possible case which might depend upon considerations of oppression or misuse of power by a public officer.

Nor is it, I think, to be regarded as decided by the opinions expressed in *Chasemore* v. *Richards* (2), per Lord Wensleydale, or in *Bradford Corporation* v. *Pickles* (3), for those cases appear to rest on the positive rights of owners of property; nor by the *Mogul Case* (4), where the ground of the decision was that the action of the defendants had been determined by motives of ordinary and legitimate self-interest. Neither of those cases seems either to affirm or negative the general proposition that where there is no injuria, malicious motive and damage can supply its place. And possibly *Stevenson* v. *Newnham* (5) may be regarded as resting on a similar ground.

Such a proposition, if of general application, would be of the highest importance, and had it formed part of our law it would seem that it must have long since become established in precedents and text-books, and have received frequent illustration by decided cases. The respondents have not been able to cite any clear authority before the present case in which the doctrine on which the present case has been decided is stated by the whole or the majority of any court as general and established law. In *Bowen* v. *Hall* (6) malice was not even alleged, and there was breach of contract. In *Temperton* v. *Russell* (7) the majority of the Court of Appeal proceeded as to part of the case on the same ground of breach of contract, and as to the other part on conspiracy. Whether there exists any such doctrine limited to cases of interference with trade must be presently considered; but, apart from such cases, I think that the few and isolated authorities which have been cited as supporting the general doctrine, even if not referable to other grounds, such as nuisance, slander of title, violence, fraud, or intimidation, are insufficient to establish it, and for the most part even imply the negative of it from the fact that such other grounds are relied on.

Great stress was laid by the respondents' counsel on the expression in Lord Holt's revised judgment in *Ashby* v. *White* (8), that it is the fraud and the malice that entitles the party to the action. But there is not the least doubt

(1) 13 Moo. P. C. 209, 237, 241.
(2) (1859) 7 H. L. C. 349.
(3) [1895] A. C. 587.
(4) [1892] A. C. 25.
(5) 13 C. B. 285.
(6) 6 Q. B. D. 333.
(7) [1893] 1 Q. B. 715.
(8) Holt's Judgments, ed. 1837, 12, 32.

what the real effect of *Ashby* v. *White* (1) is. Lord Holt decided it on the ground, for which the case has passed into the common stock of legal knowledge, that legal right and legal remedy are co-extensive, ubi jus, ibi remedium. This proposition the House of Lords, and afterwards Lord Holt himself, qualified in relation to the particular class of cases, adding that it must appear that the plaintiff's right was wilfully infringed. And so the case has always been understood. See *Drewe* v. *Coulton* (2); *Harman* v. *Tappenden* (3), per Lawrence J.; *Milward* v. *Sargeant* (4); *Cullen* v. *Morris* (5), where *Ashby* v. *White* (1) was much discussed, and Abbott C.J. says: "In order to sustain this action it is necessary for the plaintiff to shew, in the first place, that he had a right to vote," and he proceeds to shew that a malicious intention must also be proved.

But the matter does not rest merely on the absence or insufficiency of authority in support of the suggested doctrine as a general one. There is a well-known authority which, subject to the observation that I have made upon it in connection with *Chasemore* v. *Richards* (6) and *Bradford* v. *Pickles* (7), seems expressly to negative it. In the considered decision of the Exchequer Chamber, in *Stevenson* v. *Newnham* (8), the ground of the judgment delivered by Parke B., for himself and Coleridge, Wightman, Erle, and Crompton J.J., and Platt and Martin BB., in a case of distress, was that "an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

The same view is clearly implied in *Lumley* v. *Gye* (9), where the demurrer necessarily admitted a malicious damage to the plaintiff; but it did not occur to counsel or to any of the judges that this amounted to a cause of action, although such a view would have afforded an obvious ground of decision, and would have rendered immaterial or unnecessary most of the arguments of counsel and of the reasoning of the judges.

And in accordance with the same view is the decision in Ireland in the case of *Kearney* v. *Lloyd* (10), decided by Palles C.B., Dowse B. and Andrews J. There the jury found (inter alia) that the defendants had procured persons to discontinue their subscriptions to the sustentation fund of a curate, and had done so partly from a malicious motive, in order to drive him out of the parish; and Palles C.B., after citing *Rogers* v. *Rajendro Dutt* (11), said: "To support the action the words 'injury' and 'injured' must be read in their strict legal sense as meaning the infringement of some legal right vested in the plaintiff." Where no such infringement can be shewn, I should adopt the words of Lord Bramwell in *Capital and Counties Bank* v. *Henty* (12): "It seems to me that the defendant's motive is immaterial, and that he might do what he did though out of anger or malice."

On the ground, therefore, of authority as well as of principle, I think that

(1) 1 Sm. L. C. (10th ed.) 231.
(2) (1787) 1 East, 563, n.
(3) (1801) 1 East, 555.
(4) (1786) 1 East, 567.
(5) (1819) 2 Stark. N. P. 577.
(6) 7 H. L. C. 349.
(7) [1895] A. C. 587.
(8) 13 C. B. 285.
(9) 2 E. & B. 216.
(10) (1890) 26 L. R. Ir. 268.
(11) 13 Moo. P. C. 209.
(12) (1882) 7 App. Cas. at p. 793.

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the right conclusion is that malicious motive, as distinguished from the wilful violation of a known right, though it is sometimes material in aggravation of damages for infringement of a right, and sometimes, as in actions for defamation or malicious prosecution, and probably in certain cases of nuisance, in some sense a necessary ingredient for a cause of action, is not of itself in conjunction with damage enough in general to constitute a cause of action where no legal right is infringed; and, if so, the ground on which this case was decided cannot be supported.

There is no exception in cases of slander or libel, for in them a legal right is infringed. I think that there is none in the case of malicious prosecution. It is not indeed easy to define the legal right the infringement of which is, when coupled with malice in either sense of that term, the ground of action in that class of cases. Lord Holt, in *Savile* v. *Roberts* (1), suggests three grounds, namely, in some cases the scandal to reputation; in others the danger to life, limb, or property; in others the forcing of the plaintiff to spend his money in necessary charges for his defence. Possibly it rather rests on the ground that a prosecution known to be groundless is an abuse of the right, given on public grounds, of bringing a person before the criminal courts and of subjecting him to the inconveniences of criminal procedure. At any rate, this action has always been considered as resting on a ground of injuria as well as of malice.

Then, if there is no such general doctrine as that which the respondents maintain, is there a limited doctrine of the same kind in relation to interference with a man's trade or employment? Beyond the important dicta of Lord Holt in *Keeble* v. *Hickeringill* (2), the authorities cited do not appear to be adequate to sustain the weight of such a proposition.

If such were the law, it would be reasonable to suppose that it would long since have been established by recognised precedents of pleading, and by numerous cases dealing with a question of such frequent occurrence and affecting such varied and important interests, and by at least some cases affirming it after discussion of the grounds and limits of so anomalous and important an exception to the general rule. In fact, however, the authorities cited in support of it are, until *Temperton* v. *Russell* (3), no more than dicta, and, with the exception of Lord Holt's dicta in *Keeble* v. *Hickeringill* (2), they are indistinct and referable to other grounds, as was pointed out by Bowen L.J. in the *Mogul Case* (4), either violence or threat of violence, as in *Garret* v. *Taylor* (5) and *Tarleton* v. *M'Gawley* (6); or conspiracy and actual disturbance of trade, as in *Gregory* v. *Duke of Brunswick* (7), or obstruction in the use of the highway, or physical interference with trade, as in *Green* v. *London General Omnibus Co.* (8); or slander of title, or nuisance, or other similar grounds. *Keeble* v. *Hickeringill* (2) itself cannot be said to have obtained recognition as establishing any general doctrine of law. Decided in the time of Queen Anne, and reported then, and more at large in 1809 (in the note to

(1) 1 Ld. Raym. 374.
(2) 11 East, 574, n.
(3) [1893] 1 Q. B. 715.
(4) 23 Q. B. D. 611, et seq.
(5) Cro. Jac. 567.
(6) 1 Peake, N. P. C. 270.
(7) 6 M. & G. 205, 953.
(8) 7 C. B. (N.S.) 290.

Carrington v. *Taylor* (1)), it must have been known to lawyers for nearly two centuries. Yet no reference to it is to be found in Smith's Leading Cases or in Bullen and Leake's Precedents. In Buller's Nisi Prius it is barely mentioned, and there, and in Selwyn's Nisi Prius, the dicta for which it is now cited are not mentioned at all.

Against such slender, uncertain, and qualified authorities are the unqualified decision in *Stevenson* v. *Newnham* (2) already cited, and the negative inference to be drawn from the absence of mention of any such doctrine in precedents of pleadings and in keenly contested cases, of which it would have afforded a ready solution.. In *Lumley* v. *Gye* (3) the demurrer was to a declaration which alleged that the defendant contriving, and wrongfully and maliciously intending, to injure, prejudice, and aggrieve the plaintiff in his possession and management of his theatre, and in the gains and profits derived therefrom, did the alleged wrong, and that damage of the intended kind was caused to the plaintiff by the defendant's act, and all this was necessarily admitted on the demurrer; yet none of the very eminent judges or counsel in the case seem to have been aware of the doctrine now suggested. If it had been known to them, some mention of it must have been made, and it would have rendered unnecessary most of the arguments and elaborate reasoning on other points. It seems difficult to suppose that such a doctrine is part of the common law, and yet was not known to either Crompton J., Erle J., Wightman J., or Coleridge J.

It seems to me that these considerations outweigh the authority of Lord Holt's dicta in *Keeble* v. *Hickeringill* (4), and that it must be held that the supposed exception to the general law is not established.

For these reasons I answer your Lordships' question in the negative.

The House took time for consideration.

Dec. 14. LORD HALSBURY L.C. My Lords, in this case the two plaintiffs sued three persons as defendants for having maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the employers, videlicet, a certain company called the Glengall Iron Company, to break contracts, and not to enter into contracts with them, whereby the plaintiffs had suffered damage.

I have compendiously stated the cause of action, as I conceive it to be, in order to discuss by itself the main and important principle which is at stake in the determination of this appeal; but I shall return to the question of the pleadings and to the course of the trial before Kennedy J., since it appears to me that some confusion has been created by not keeping

(1) 11 East, 571.
(2) 13 C. B. 285.
(3) 2 E. & B. 216.
(4) 11 East, 574, n.

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separate objections directed to those subordinate parts of the appeal from the cause of action itself as I have stated it.

The two plaintiffs were shipwrights, and were working in their trade on board a vessel called the *Sam Weller*. The vessel was being repaired, and the two plaintiffs were engaged by the Glengall Iron Company to work at their trade in the repair of the vessel.

I think there is much to be said for the doubt thrown out by Hawkins J. in his elaborate and most able opinion, whether the assumption was accurate on which both parties conducted the case, namely, that there was no contractual relation between the employers and employed so as to bring into debate the question of whether there was any inducement offered to the Glengall Iron Company to break contracts with the plaintiffs. But for the present I will assume that there was no contract by which the company were bound to keep the plaintiffs in their service till the repairs of the vessel were completed, while on the other hand there was no reasonable doubt that but for what was done by the defendant they would have been kept at work until the termination of the repairs.

My Lords, I am not concerned to discuss minutely the evidence where the witnesses are in conflict, or where it may be contended that the witnesses relied on by the plaintiffs have exaggerated or misunderstood what was said by the defendant. Such questions were for the jury, and if there was any reasonable evidence for them it was for them, and not for me or for anyone else, to decide.

The plaintiffs gave evidence that while thus employed the defendant Allen came to the responsible manager of the Glengall Iron Company and made certain communications (which I will deal with presently, because upon the character of those communications much depends), and that in consequence of those communications they were discharged from their employment. As to the one being the consequence of the other, although in a certain sense it is still a question of fact, I confess I am surprised in no small degree to hear a doubt suggested that it was not in consequence of the communications made by Allen that the plaintiffs were discharged. One of the officers

of the defendant company, it is true, explains that it was for peace and quietness in the yard; but though his words are accompanied by such expressions as these, I should have thought no one could have seriously doubted that what he meant (and, indeed, I think what he said), in the ordinary intelligible use of language, was that he discharged them because he could not have the work in his yard interrupted. I confess I am wholly unable to understand what is stated by some of your Lordships that the men were not discharged by reason of anything that Allen said, and that the boiler-makers would have ceased working even if Allen had said nothing: this is not the evidence, and, what is more important, it is in the teeth of the express finding of the jury in answer to Kennedy J.'s question, as I will presently shew. And, in truth, if this were accurate, there would be nothing to discuss, since, in that case, Allen would have done nothing that caused any damage to anyone.

And now I will quote, as nearly as I can, the language which is alleged to have been used by Allen in his communications. I quote first what was stated by Mr. Halkett, who was the managing director of the Glengall Iron Company. Allen said, "He had received word from *some* of the boiler-makers that were working in our yard that they wanted to see him, and he came round and had an interview with these men, and they told him that we had two shipwrights engaged in our employment who were known to have done ironwork before in Mills & Knight's yard, and that unless these two men were discharged from our employment that day, all the ironworkers belonging to his society would leave off work that day; and they gave as the only reason that these men were guilty of doing ironwork in Mills & Knight's yard . . . . The substance of what he said was that they were *really trying to put an end to this practice* of doing ironwork by the shipwrights—to stop shipwrights being engaged in ironwork. That it was not from any ill-feeling against ourselves nor against any men in particular —Flood and Taylor; but they—that is, the boiler-makers—had made up their minds—or we have made up our minds—that wherever it is known that any shipwrights have been engaged doing ironwork, their workmen—that is, the boiler-

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makers'—would cease work on the same ship on the same employment."

Then a question was asked, "Did he say anything in regard to Flood and Taylor in respect of other yards besides yours?" And the answer was, "Not in a particular sense; in a general sense that these men would be followed—that these men were known—it was so difficult to get them known; that these men were known, and wherever these men were employed the same action would be taken there as had been taken in our place." He also said, "You have no option. If you continue to engage these men our men will leave . . . . It was in consequence of that that the men were discharged. It was the fear of the threat being carried out—of the men leaving—the boiler-makers. If the boiler-makers had left or had been called out it would seriously have impeded our business . . . . The threat to withdraw these ironworkers extended to every workman we had in our employment at whatever place." He goes on to say (after an embarrassing interruption) that "the threat was to withdraw the ironworkers in the employment of the Glengall Iron Company from every ship or every job upon which the Glengall Iron Company were engaged on which the men of their union were employed."

Mr. Edmonds, the foreman of the Glengall Iron Company, deposed as follows: "Mr. Halkett sent for me and when I got in the room he said, 'Mr. Allen has come here and says that if those two men'—that is, Flood and Taylor—'are not discharged all of the iron-men will knock off work or be called out.' I will not be sure what term he used. I asked Mr. Allen the reason why. He said because those two men had been working at Messrs. Mills & Knight's on ironworks. I told him I thought it was very arbitrary on his part to do anything like that. I told him I thought it was not right that Messrs. Mills & Knight's sins should be visited upon us."

(Q.) "Did anything else take place?"

(A.) "For the reason that we were not employing the shipwrights on ironwork, and never had done so—not at the Glengall. There was a lot of other conversation, but that is not material to this case. He says that was the case, and if

these men were not discharged, their men would be called out or 'knock off'—I will not be sure what term he used. Me and Mr. Allen had a few words, but that is immaterial to this. I think that is all that is material to this case."

(Q.) "Was anything said about other yards?"

(A.) "Yes. When I spoke about it not being right to visit Mills & Knight's sins on us, he said the men would be called out from any yard they went to—they would not be allowed to work anywhere in London river."

As I have said, in the face of this evidence, how anyone can doubt that it was the communications made by Allen that caused the dismissal of these two men, I am not able to understand; and in what I have to say hereafter I shall assume as proved, or, at all events, as established by evidence proper to be submitted to a jury, that it was Allen who caused the dismissal of the plaintiffs.

The first objection made to the plaintiffs' right to recover for the loss which they thus undoubtedly suffered is that no right of the plaintiffs was infringed, and that the right contended for on their behalf is not a right recognised by law, or, at all events, only such a right as everyone else is entitled to deprive them of if they stop short of physical violence or obstruction. I think the right to employ their labour as they will is a right both recognised by the law and sufficiently guarded by its provisions to make any undue interference with that right an actionable wrong.

Very early authorities in the law have recognised the right; and, in my view, no authority can be found which questions or qualifies it. The schoolmaster who complained that his scholars were being assaulted and brought an action (1), the quarry owner who complained that his servants were being menaced and molested, were both held to have a right of action. And it appears to me that the importance of those cases, and the principle established by them, have not been sufficiently considered. It is said that threats of violence or actual violence were unlawful means: the lawfulness of the means I will discuss hereafter. But the point on which these cases are important is the existence of the right. It was not the schoolmaster who

(1) [See note (1), p. 55 above.—F. P.]

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was assaulted; it was not the quarry owner who was assaulted or threatened; but, nevertheless, the schoolmaster was held entitled to bring an action in respect of the loss of scholars attending his school, and the quarry owner in respect of the loss of workmen to his quarry. They were third persons; no violence or threats were applied to them, and the cause of action, which they had a right to insist on, was the indirect effect upon themselves of violence and threats applied to others.

My Lords, in my view these are binding authorities to shew that the preliminary question, namely, whether there was any right of the plaintiffs to pursue their calling unmolested, must be answered in the affirmative. The question of what is the right invaded would seem to be reasonably answered, and the universality of the right to all Her Majesty's subjects seems to me to be no argument against its existence. It is, indeed, part of that freedom from restraint, that liberty of action, which, in my view, may be found running through the principles of our law.

As I have said, I will deal separately both with the remedy for the infringement of that right, if it has been infringed, and with the means by which it is alleged to have been infringed.

Upon this part of the case I wish to quote and make my own the language of Bramwell B. in *Reg.* v. *Druitt* (1): "When the law gave, or rather acknowledged, a right, it provided a punishment or a remedy for the violation of that right. That was a cardinal rule and an obvious one. The old expression that 'there was no wrong without a remedy' might also be interpreted to mean that there was also no right without a remedy. Sometimes the remedy was by a criminal proceeding, sometimes by a civil action, sometimes by both. Having made those general remarks he would make another, which was also familiar to all Englishmen—namely, that there was no right in this country under our laws so sacred as the right of personal liberty. No right of property or capital, about which there had been so much declamation, was so sacred or so carefully guarded by the law of this land as that of personal liberty. They were quite aware of the pains taken by the common law, by the writ, as it was called, of habeas

(1) 10 Cox, C. C. 600.

corpus, and supplemented by statute, to secure to every man his personal freedom—that he should not be put in prison without lawful cause, and that if he was he should be brought before a competent magistrate within a given time, and be set at liberty or undergo punishment. But that liberty was not liberty of the body only. It was also a liberty of the mind and will; and the liberty of a man's mind and will, to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body. Generally speaking, the way in which people had endeavoured to control the operation of the minds of men was by putting restraints on their bodies, and therefore we had not so many instances in which the liberty of the mind was vindicated as was that of the body. Still, if any set of men agreed among themselves to coerce that liberty of mind and thought by compulsion and restraint, they would be guilty of a criminal offence—namely, that of conspiring against the liberty of mind and freedom of will of those towards whom they so conducted themselves. He was referring to coercion or compulsion—something that was unpleasant and annoying to the mind operated upon, and he laid it down as clear and undoubted law that if two or more persons agreed that they would by such means co-operate together against that liberty they would be guilty of an indictable offence."

It is said, indeed, that an action for the infringement of such a right is a novelty; but I do not concur that it is, or that if it were it would be a sufficient argument. The whole history of the action upon the case, from 13 Edw. 1, c. 24, downwards affirms the principle that where cases fall under the same right and require a like remedy new precedents should be created.

So in *Pasley* v. *Freeman* (1), per Ashhurst J.: "Another argument which has been made use of is that this is a new case, and that there is no precedent for such an action. Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a

(1) (1789) 3 T. R. at p. 63.

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principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."

First it is said that the company were acting within their legal rights in discharging the plaintiffs. So they were; but does that affect the question of the responsibility of the person who caused them so to act by the means he used? The scholars who went away from the school were entitled to do so. The miners were entitled to cease working at the quarry. The natives were entitled to avoid running the risk of being shot; but the question is, What was the cause of their thus exercising their legal right?

The question must be whether what was done in fact, and what did in fact procure the dismissal of the plaintiff, was an actionable wrong or not. I have never heard that a man who was dismissed from his service by reason of some slander could not maintain an action against the slanderer because the master had a legal right to discharge him.

In treating the question I can desire no more apt exposition of the law than what is contained in Bowen L.J.'s admirably reasoned judgment in the *Mogul Case* (1) in the Court of Appeal: "Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by shew of violence: *Tarleton* v. *M'Gawley* (2); the obstruction of actors on the stage by preconcerted hissing: *Clifford* v. *Brandon* (3); *Gregory* v. *Brunswick* (4); the disturbance of wild fowl in decoys by the firing of guns: *Carrington* v. *Taylor* (5) and *Keeble* v. *Hickeringill* (6); the impeding or threatening servants or workmen: *Garret* v. *Taylor* (7); the inducing persons under personal contracts to break their con-

(1) 23 Q. B. D. 614.
(2) 1 Peake, N. P. C. 270.
(3) 2 Camp. 358.
(4) 6 Man. & G. 205, 953.
(5) 11 East, 571.
(6) 11 East, 574, n.
(7) Cro. Jac. 567.

tracts: *Bowen* v. *Hall* (1); *Lumley* v. *Gye* (2)—all are instances of such forbidden acts."

It will be observed that in what Bowen L.J. says, intimidation, obstruction or molestation, or intentional procurement of a violation of individual rights, contractual or other (always assuming that there is no just cause for it), are each of them, where damage has been caused, actionable wrongs. And so Sir William Erle, in a passage quoted by the late Master of the Rolls (Lord Esher), points out that "every person has a right under the law, as between himself and his fellow-subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition" (Erle on Trade Unions, p. 12).

The Lord Justice was too keen a reasoner not to observe that the words "without just cause or excuse" which he had used required exposition to render his reasoning complete, and accordingly he explains in another part of his judgment what his view was of malice. His Lordship thus describes the state of mind which, in his view, would negative just cause or excuse (*Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3)): "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong: see *Bromage* v. *Prosser* (4); *Capital and Counties Bank* v. *Henty* (5), per Lord Blackburn."

(1) 6 Q. B. D. 333.
(2) 2 E. & B. 216.
(3) 23 Q. B. D. 613.
(4) 4 B. & C. 247.
(5) 7 App. Cas. 741, at p. 772.

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My Lords, I must for my own part disclaim the idea that you can get rid of observations such as these in the learned judge's judgment by saying that they are obiter. Of course, one is familiar with the observation that such and such an opinion expressed by a learned judge was not necessary for the decision of the case. But where a distinction is being drawn between what is lawful and what is not, and where, as in this case, the observations form part of the reasoning by which the conclusion is arrived at, it appears to me that whichever way the decision may be one part of the judgment is as much an authoritative exposition of the law as the other.

Now, it will be observed that Bowen L.J. points out that not only contractual rights are comprehended within his view but other rights, such as the right to carry on the business of an actor and the like.

In the same case, when appealed to this House (1), it appears to me that the principle upon which that decision was arrived at is an important one, as excluding what is here suggested to be lawful. I myself asked in that case: "What legal right is interfered with? What coercion of the mind or will or of the person is effected? All are free to trade upon what terms they will, and nothing has been done, except in rival trading, which can be supposed to interfere with the appellants' interests."

Lord Watson pointed out that the withdrawal of agents at first appeared to him to be a matter attended with difficulty, but that on consideration he was satisfied that it could not be regarded as an illegal act: "In the first place, it was impossible that any honest man could impartially discharge his duty of finding freights to parties who occupied the hostile position of the appellants and respondents; and, in the second place, the respondents gave the agents the option of continuing to act for one or other of them in circumstances which placed the appellants at no disadvantage." And he added "that it had not been proved and not been suggested that the respondents used either misrepresentation or compulsion for the purpose of attaining the object of their combination."

And Lord Bramwell begins his judgment by saying that the

(1) [1892] A. C. 38.

plaintiffs in that case "did not complain of any trespass, violence, force, fraud, or breach of contract, nor of any direct tort or violation of any right of the plaintiffs, like the case of firing to frighten birds from a decoy; nor of any act the ultimate object of which was to injure the plaintiffs having its origin in malice or ill-will to them."

Lord Morris expressed his intention to adopt entirely the principles laid down by Bowen L.J.; and Lord Macnaghten read and adopted Lord Bramwell's judgment.

Lord Field justifies his opinion, which he says may be supported upon the principles laid down in *Keeble* v. *Hickeringill* (1), as to which I shall have a word to say hereafter. But he goes on to say that "everything that was done by the respondents was done in the exercise of their right to carry on their own trade, and was bonâ fide so done. There was not only no malice or indirect object in fact, but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the presumption of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm."

And Lord Hannen says "that he considered that a different case would have arisen if the evidence had shewn that the object of the defendants was a malicious one—namely, to injure the plaintiffs, whether they, the defendants, should be benefited or not." And he concludes his judgment by saying "that it appears to him that in that case there was nothing indicating an intention to injure the plaintiffs, except in so far as such injury would be the result of the defendants obtaining for themselves the benefits of the carrying trade, by giving better terms to customers than their rivals, the plaintiffs, were willing to offer."

My Lords, I have been careful to call attention to the opinions of the noble and learned Lords, not only because I think a use has been made of the decision in that case which is not justified by anything in the opinions delivered, but rather because I

(1) 11 East, 574, n.

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think that, upon the principles I have indicated before, these opinions form a very considerable body of authority that, if the elements which each noble Lord in turn pointed out did not exist in that case had in fact existed, the decision would have been the other way.

My Lords, I do not think that the case of *Keeble* v. *Hickeringill* (1) stands alone, though if it did, considering who decided it, and that certainly in later years it has been much quoted and commented on, and never until now, so far as I am aware, criticised or questioned, I should be quite content to rely upon the authority of so profound a lawyer as Sir John Holt, and such an expositor as he was of the spirit of freedom which runs through the English law; but it will be also observed that in this House Lords Bramwell and Field, and in the Court of Appeal Bowen L.J., assume it to be good law.

It is interesting to observe that that case has been recognised and acted upon in the American courts, where these questions of capital and labour have not infrequently arisen.

In *Walker* v. *Cronin* (2) it was held that an action of tort would lie upon a count alleging that the plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendant, well knowing this, did unlawfully, and without justifiable cause, molest him in carrying on the said business with the unlawful purpose of preventing him from carrying it on, and wilfully induced many shoemakers who were in his employment, and others who were about to enter into it, to abandon it without his consent and against his will, and that thereby he lost their services and the profits, &c., to be derived therefrom, and was put to expense, &c. The second count alleges contracts between the plaintiff and the shoemakers to make stock into shoes, and that the defendant, "well knowing this, with the unlawful purpose of preventing him (the plaintiff) from carrying on his business, induced them to return the stock unfinished to the factory, and to neglect and refuse to make it into shoes as they had agreed to do." The third count alleges that the defendant enticed and procured a shoemaker in the plaintiff's service

(1) 11 East, 574, n. (2) 107 Mass. 555.

and employment who had agreed to make three cases of shoes to leave the plaintiff's service and employment. There was a demurrer to the declaration, and this demurrer was allowed in the Superior Court, whereupon the plaintiff appealed. Wells J., after citing Com. Dig. Action on the case A: "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action on the case to be repaired in damages," goes on to review in order *Keeble* v. *Hickeringill* (1); *Tarleton* v. *M'Gawley* (2); *Green* v. *Button* (3); *Gunter* v. *Astor* (4); *Hart* v. *Aldridge* (5); *Shepherd* v. *Wakeman* (6); *Winsmore* v. *Greenback* (7); *Lumley* v. *Gye*. (8) He overruled the demurrer, and, holding that the declaration sufficiently alleged (1.) intentional and wilful acts, (2.) calculated to cause damage to the plaintiff in his lawful business, (3.) done with the unlawful purpose to cause such damage and loss without right or justifiable cause on the part of the defendant (which constitutes malice), and (4.) actual damage and loss resulting, held that each of the three counts disclosed a good cause of action. "This decision," continues the learned judge, "does not apply to a case of interference by way of friendly advice, honestly given; nor is it in denial of the right to free expression of opinion. We have no occasion now to consider what would constitute justifiable cause."

Benton v. *Pratt* (9) and *Rice* v. *Manley* (10) were both cases where the defendant through false words caused a third person, who had entered into contracts of sale (in the first-named case of cheese, in the second of hogs) void by the Statute of Frauds, to break such contracts. An action was held to lie in each case.

In *Bixby* v. *Dunlap* (11) it was held that exemplary damages could be recovered from a defendant who knowingly procured a servant to leave a master whom she had contracted to serve without ever being actually in his employment. *Lumley* v.

(1) 11 East, 574, n.
(2) 1 Peake, N. P. C. 270.
(3) 2 C. M. & R. 707.
(4) (1819) 4 J. B. Moore, 12.
(5) (1774) 1 Cowp. 54.
(6) 1 Sid. 79.
(7) (1745) Willes, 577.
(8) 2 E. & B. 216.
(9) (1829) 2 Wend. 385.
(10) (1876) 66 N. Y. (21 Sickels) 82.
(11) 22 Amer. Rep. 475.

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Gye (1) is here taken as having laid down the law on this subject.

In *Angle* v. *Chicago, &c., Ry. Co.* (2), it was alleged that the United States had granted lands in the State of Wisconsin in aid of the construction of railways. The State of Wisconsin had granted a portion of these lands to the defendant company for the purpose of constructing a particular railway. It had also granted other lands to another company, the Portage Company, to construct another and somewhat competing railway: this latter railway was to be completed within a certain time. This could not be done, and the State of Wisconsin enlarged the time for completion. The Portage Company then employed the plaintiff to complete the line, and he was actively prosecuting the work when the defendant company, conspiring with certain officials of the Portage Company, induced the State of Wisconsin to revoke the concession to the Portage Company, whereby the plaintiff lost his employment. He accordingly brought his action. The Court held, following *Lumley* v. *Gye* (1) and *Bowen* v. *Hall* (3), that the defendant company were liable to the plaintiff.

My Lords, I now revert to that part of the case which I admit has to be carefully considered: whether in what the defendant did in order to procure the dismissal of the plaintiffs he came within any of the rules which have been laid down in the cases quoted. Now, to my mind, he was guilty of intimidation and coercion through that intimidation. In using that word "intimidation," I am not using it in the technical sense which the statutes upon the subject have been construed to mean; I will explain in what sense I do understand the word; but in passing I must deprecate the language which has been used to minimise the effect of what Allen said. I observe it is described as "inconvenience." That is not how it is described by the witness. Edmonds, the foreman of the Glengall Company, thus describes what would have been the effect upon the business of the firm. He says: "They were rather busy just then with the boiler-makers; that they employed three times

(1) 2 E. & B. 216. (2) (1893) 151 U. S. 1.
(3) 6 Q. B. D. 333.

as many boiler-makers as shipwrights, and if the boiler-makers had knocked off work or struck, it would have stopped the business of the company altogether—entirely—at that time, and that it was a very serious matter to the firm, and that the discharge of the men was in order to prevent their having to stop their business."

My Lords, it seems to me very obvious to ask whether the threat to do that which will have such an effect as the witness described is a coercion of the will or not. The men were good workmen and of good character; they were working, even according to Allen's own view, at their own trade as shipwrights, but they had worked upon a former occasion for a different employer upon an iron ship.

I think the dissatisfaction among the boiler-makers at these two men being employed has been greatly exaggerated. The man Elliott, who actually sent for Allen, gives this account of it: "We were having a talk together at breakfast-time, and some of them felt dissatisfied about it. Some of them said we had better leave our work. I said, 'Do not do anything of the kind' . . . . I sent a telegram to Allen . . . . When I met Mr. Allen at breakfast-time the next morning he said to me, 'Well, what is this here little bit of a trouble here?' 'Well,' I said, 'the chaps are dissatisfied about these here two plaintiffs Flood and Taylor being in the habit of working over at Mills & Knight's.' 'Well,' he said, 'what do they want?' 'Some of them are saying they are going to leave their work.' He says, 'The best thing you can do is to go in and tell them not to leave their work until things are settled; wait and see how things settle.' I said, 'Very good; I will tell them what you say now.'"

The cross-examination is important with reference to what took place afterwards, and as exhibiting the extent and degree to which even some of the men—for it goes no further—expressed their wishes. The learned counsel asks: "Their wishes were that these men whose conduct they objected to at Mills & Knight's should not be kept in the same employ with themselves?—(A.) Oh, no. (Q.) That was the feeling, was it not?—(A.) No. (Q.) Well, let me understand.—(A.) They

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did not say they should not be kept in the employ of the firm at all. (Q.) They did not say they should not be kept on the job on which they were being employed?—(A.) They did not wish them among our midst. (Q.) Working on the same ship?—(A.) Yes."

It will be observed how limited are the numbers in respect of which the allegation of discontent is put forward, and it will be observed that this witness entirely repudiated any wish to prevent these men being employed; but even that wish is limited to the desire that they should not be employed upon the same ship. But perhaps the most astonishing part of the case is to be found in Allen's own evidence.

Allen denies that he had ever said anything about the men being called out. He denies in terms that he said the same thing would happen in any yard where the two men were employed. He denies that he used that memorable language, "We have made up our minds that wherever it is known that there are any shipwrights who have been engaged doing iron-work the boiler-makers will leave work in that yard." Being asked whether he wished the step to be taken of the two men being discharged, he said, "He had no such thought floating in his mind at the time." This is, of course, in direct conflict with the evidence given by the manager and the foreman of the Glengall Company; but, as I have said, the credibility of the witness was for the jury and not for me.

And now it is important to call attention to the exact question which was left to the jury. Kennedy J. said: "The question that I want you to answer is that, if you find he induced the Glengall Iron Company by the threat which is suggested by the plaintiffs of calling out all the men on strike, and he continued in that course of conduct if there was any attempt to employ them again, did he do that with the malicious intention which I have endeavoured to explain, that is merely, not for the purpose of forwarding that which he believed to be his interest as a delegate of his union in the fair consideration of that interest, but for the purpose of injuring these plaintiffs, and preventing them doing that which they were each of them entitled to do." Observe the phrase used,

"the threat suggested by the plaintiffs of calling out all the men on strike," and that that induced the Glengall Iron Company to discharge the plaintiffs; and yet it is to be said that Allen's threat had nothing to do with the discharge of the plaintiffs. It will be observed that Kennedy J. draws a distinction between the conduct which he assumes to be lawful on Allen's part to do what he did do if it were merely for the purpose of forwarding that which he believed to be his interest as a delegate of his union in fair consideration of that interest on the one hand, and on the other hand his conduct if what he did was done for the purpose of injuring these plaintiffs.

My Lords, it appears to me that that is a direction of which the defendants cannot complain, since it puts what is to my mind an alternative more favourable to them. In my view, his belief that what he was doing was for his interest as a delegate of his union would not justify the doing of what he did do. It is alleged, and to my mind and to the mind of the jury proved, that the employers were compelled under pressure of the threats that he used to discharge the plaintiffs.

I have not used the word "intimidated," because I observe the learned judge says there was no intimidation in a legal sense. If what was meant by that was that there was no threat of violence to person or property, it is true; but the word "intimidation" is not always to be construed as it has been construed under 6 Geo. 4, c. 129. The construction of it in that statute flowed from the other words with which the word "intimidate" is associated; and if, without using the word "intimidate," that which was held out as the inducement to dismiss the plaintiffs was that such a stoppage of the works should be occasioned as that the business of the company would seriously suffer, I should think that would be a thing which would be likely to produce fear of the consequences of the company retaining them in their employment, and a company which abstained from doing so by reason of that fear would justly be described as "intimidated."

But the objection made by the defendants appears to be that the word "malicious" adds nothing; that if the thing was lawful it was lawful absolutely; if it was not lawful it was

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unlawful—the addition of the word "malicious" can make no difference. The fallacy appears to me to reside in the assumption that everything must be absolutely lawful or absolutely unlawful. There are many things which may become lawful or unlawful according to circumstances.

In a decision of this House it has undoubtedly been held that whatever a man's motives may be, he may dig into his own land and divert subterranean water which but for his so treating his own land might have reached his neighbour's land. But that is because the neighbour had no right to the flow of the subterranean water in that direction, and he had an absolute right to do what he would with his own property. But what analogy has such a case with the intentional inflicting of injury upon another person's property, reputation, or lawful occupation? To dig into one's own land under the circumstances stated requires no cause or excuse. He may act from mere caprice, but his right on his own land is absolute, so long as he does not interfere with the rights of others.

But, referring to Bowen L.J.'s observation, which to my mind is exactly accurate, "in order to justify the intentional doing of that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade," you must have some just cause or excuse.

Now, the word "malicious" appears to me to negative just cause or excuse; and without attempting an exhaustive exposition of the word itself, it appears to me that, if I apply the language of Bowen L.J., it is enough to shew that this was within the meaning of the law "malicious."

It appears to me that no better illustration can be given of the distinction on which I am insisting between an act which can be legally done and an act which cannot be so done because tainted with malice, than such a colloquy between the representative of the master and the representative of the men as might have been held on the occasion which has given rise to this action. If the representative of the men had in good faith and without indirect motive pointed out the inconvenience that might result from having two sets of men working together on

the same ship, whose views upon the particular question were so diverse that it would be inexpedient to bring them together, no one could have complained; but if his object was to punish the men belonging to another union because on some former occasion they had worked on an iron ship, it seems to me that the difference of motive may make the whole difference between the lawfulness or unlawfulness of what he did.

I see it is suggested by one of your Lordships that the action for malicious prosecution is supposed to be an exception. I am not quite certain that I understand what is the proposition to which it is an exception. If it means that there is no other form of procedure known to the law wherein malice may make the distinction between a lawful and an unlawful act, I am unable to agree. Maliciously procuring a person to be made a bankrupt, maliciously and without reasonable or probable cause presenting a petition to wind up a company, or maliciously procuring an arrest, are equally cases wherein the state of mind of the person procuring the arrest may affect the question of the lawfulness or unlawfulness of the act done.

Again, in slander or libel the right to preserve one's character or business from attack appears to me quite as vague and general a right as it is suggested is the right to pursue one's occupation unmolested; and it cannot be denied that in both these cases the lawfulness or unlawfulness of what is said or written may depend upon the absence or presence of malice.

Doubtless there are cases in which the mere presence of malice in an act done will not necessarily give a right of action, since no damage may result; and in this case, however malicious Allen's intervention may have been, if the employers had defied Allen's threats instead of yielding to them, the plaintiffs could not have succeeded in an action, because they would not have been injured: see *Quartz Hill Co.* v. *Eyre* (1); *Gibbs* v. *Pike* (2); *Jenings* v. *Florence.* (3)

On the same principle an action will not lie against a sheriff for a false return to a writ of execution if the plaintiff has not

(1) 11 Q. B. D. 674. (2) 9 M. & W. 351.
(3) (1857) 2 C. B. (N.S.) 467.

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suffered actual damage in consequence of the false return: see *Wylie* v. *Birch*. (1)

I turn now to the course of the trial, which is important in more ways than one. It is manifest that both the form of the statement of claim and the evidence directed at the trial were intended to raise the question of the right of the Boiler Makers' Union to use what I will call their union for the combined action against the individual plaintiffs who belonged to another union.

The plaintiffs apparently proceeded upon the assumption that what was represented to them as having been said by Allen was said in his character of delegate of and speaking with the authority of the Boiler Makers' Union, and, accordingly, the general secretary of this trades union and the chairman at the time of these transactions were both joined as defendants. Had they adopted or been proved to authorize the course taken by Allen, a question would have arisen whether or not they were all three parties to a conspiracy. Whether that charge could have been maintained against them or not I at present desire to say nothing. Such a question may arise again, and I wish to keep myself free to consider that question when it arises. But the chairman and the secretary of the union absolutely disclaimed any general or specific authority on the part of Allen either to threaten the employers or to withdraw the men. As to specific authority, the chairman proved that he had never heard of the dispute until he was served with the writ in the action. He says in terms that he never gave any authority to Mr. Allen to threaten employers to withdraw men from the work, and to do any such thing he regarded as a very serious matter for any delegate to take upon himself; and so far was he from adopting what Allen is sworn to have said, namely, that the union would hunt the two men out of every employment where they were known to be because they had once worked on an iron ship, he emphatically denies the right of his union to do anything of the sort; he says in terms, "providing that the shipwright after being at the ironwork started in some other place for instance, then I would say we have no right

(1) (1843) 4 Q. B. 566.

whatever to interfere with him unless we were then beginning ironwork again. If he started at woodwork, we would not interfere with him in any other place."

The learned counsel then put a question to him (I think somewhat under a misapprehension as to what the learned judge himself meant by a question he put), "You say that may depend on circumstances?" And his answer is, "I do not say they would in that instance, because in no instance have I ever known men interfering with him when he went to some other works and started his own particular work."

My Lords, I think it is only just to the Boiler Makers' Union to point out how emphatically and distinctly their authorized officers (chairman and general secretary) disclaimed any such practice or principle as that which Allen is sworn to have attributed to them; and accordingly no imputation or liability could properly be attributed to the Boiler Makers' Union or their authorized officers. But does that relieve Allen from the consequences of what he did?

If concerted collective action to enforce, by ruining the men's employment, the will of a large number of men upon a minority, whether the minority consists of a small or of a large number, be a cause of action where the actual damage is produced, it would seem to be a very singular result that an individual who falsely assumes the character of representing a large body, uses the name of that large body to give force and support to the threat which he utters, and so produces the injury to the individual, or to the minority, could shield himself from responsibility by proving that the body whose power and influence he had falsely invoked as his supporters had given him no authority for his threats; so that, if they in truth authorized him, he and they might all have been responsible, while the false statement that he made, though acting upon the employer by the same pressure because it was believed and producing the same mischief to the person against whom it was directed, could establish no cause of action against himself because it was false.

My Lords, I now come to the question raised upon the pleadings—that the falsehood of Allen's allegations is not set

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out. I venture to think that this objection is founded upon an erroneous assumption that the action must be brought for false representations, and that accordingly the false representations must be set out in the statement of claim. As I say, I think this is an erroneous assumption; that the action is what it is; that the defendant maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the Glengall Iron Company not to enter into contracts with the plaintiffs, whereby the plaintiffs have suffered damage.

The objection may be treated as one of form or as one of substance; treating it as one of form only, I do not think that it ever was necessary in the pleadings, where an unlawful procuring something to be done was the cause of action, to set out the means by which that something was procured. It is not necessary, says Willes C.J. in *Winsmore* v. *Greenbank* (1), "to set forth all the facts to shew how a thing which is charged to be unlawfully done was unlawful; that would make the pleadings intolerable, and would increase the length and expense unnecessarily:" And even in an indictment for conspiracy it is not necessary to state the means employed: see *Rex* v. *Sterling* (2); *Rex* v. *Kinnersley and Another* (3); see also *Sydserff* v. *Reg.* (4)

So also upon an indictment under 37 Geo. 3, c. 70, the preamble of which states that, "Whereas divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, have of late industriously endeavoured to seduce persons serving in His Majesty's forces by sea and land from their duty and allegiance to His Majesty, and to incite them to mutiny and disobedience," it was enacted "that any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces, by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit an act of mutiny," &c., should be guilty of felony. It was held that it was unnecessary in the indictment to do more than charge the defendants with having

(1) Willes, 577.
(2) (1664) 1 Lev. 125.
(3) (1719) 1 Str. 193.
(4) (1847) 11 Q. B. 245.

endeavoured to seduce persons from their allegiance without setting forth any of the words or writings by which that endeavour was made: *Rex* v. *Fuller*. (1)

If treating it as matter of substance, the objection would be that without giving notice to the defendant, and without any such specified objection being submitted to the jury, it was being imputed to him that he had said what was false, it is almost impossible to suggest that here there could be any such objection of substance. What he said and did by way of inducement, threat, or coercion was in truth the whole question in the case. He gave evidence denying what was imputed to him, and, so far from setting up the right on behalf of his union to exercise their right of withdrawing their men if the demand for the discharge of the two plaintiffs were not complied with, he absolutely denied that he had ever done so; and the proper authorities of his union, as I have pointed out already, negatived any authority to make such representations as the other witnesses proved that he did make, or that they had been parties, or would consent to be parties, to the most offensive of his threats—namely, the hunting down of the two shipwrights because they had once worked upon iron ships. This question was before the jury, and the jury could not have answered the question as they did if they had not disbelieved Allen's statement.

It seems to me, therefore, that neither in substance nor in form can any objection be made to the topic (for it is but the topic, and not the substance of the cause of action) that he was guilty of false representations as fortifying the threats that he was making. It can scarcely be contended that because he had not that authority behind him which he represented, because he was not truly representing either the wishes or the commands of his union, that could furnish him with any excuse. As well might it be contended that the highwayman was not responsible for the coercion he exercised towards his victim if he put a pistol to his head because it should afterwards turn out that the pistol was unloaded.

My Lords, I regret that I am compelled to differ so widely

(1) (1797) 1 B. & P. 180.

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with some of your Lordships; but my difference is founded on the belief that in denying these plaintiffs a remedy we are departing from the principles which have hitherto guided our Courts in the preservation of individual liberty to all. I am encouraged, however, by the consideration that the adverse views appear to me to overrule the views of most distinguished judges, going back now for certainly 200 years, and that up to the period when this case reached your Lordships' House there was an unanimous consensus of opinion; and that of eight judges who have given us the benefit of their opinions, six have concurred in the judgments which your Lordships are now asked to overrule.

LORD WATSON. My Lords, this appeal, in which the litigants are members of two rival associations of working men, registered under the Trade Unions Act of 1871, raises some important questions, upon which there appears to be room for considerable difference of opinion. The appellant is a member, and the London delegate, of the boiler-makers' society, an association which restricts the labour of its members to iron-work; whilst the two respondents belong to the society of shipwrights, whose members are permitted to work either in wood or iron—an alternative which, whether rightly or wrongly, is not regarded with favour by the boiler-makers.

In the month of April, 1894, about forty men of the boiler-makers' society were engaged at the Regent Dock, Millwall, in repairing an iron ship, on the employment of the Glengall Iron Company. The respondents were at the same time employed by the company to execute repairs upon the woodwork of the vessel. The boiler-makers having learned that the respondents, although they were at that time engaged in carpenter-work, had on previous occasions undertaken and executed ironwork in other shipyards, resolved that they would not continue at the same job with workmen who wrought in iron as well as wood; and they were accordingly prepared to leave the Regent Dock in a body as soon as their engagement with the Glengall Iron Company, which was merely from day to day, expired. Being apprehensive, however, that they might not be allowed

strike pay by their union if they left their work without the approval of some of its office-bearers, they on April 12 telegraphed for the appellant, who, in compliance with their request, went to the yard on the morning of the day following. He was there met by one of the workmen who had sent for him, who on their behalf informed him that they objected to the respondents, who had done ironwork elsewhere, working among them, and that they intended in consequence to leave the work on that day after the dinner-hour. The appellant intimated that in his opinion the men would not be justified in striking work as they contemplated until an attempt had been made to settle the matter otherwise. He then had an interview with the managing director of the Glengall Iron Company, at which the foreman of the yard was present, the result being that on the afternoon of the same day the services of the respondents were dispensed with by the company, and the boiler-men continued at their work.

The present action was brought against the appellant in the beginning of July, 1894, and in February 1895 it was tried before Kennedy J. and a jury, who returned affirmative answers to these two questions: "(1.) Did the defendant Allen maliciously induce the Glengall Iron Company to discharge the plaintiffs, or either of them, from their employment? (2.) Did the defendant Allen maliciously induce the Glengall Iron Company not to engage the plaintiffs, or either of them?" and assessed damages to each of the respondents at 20*l*.

The appellant contends that judgment ought to be entered in his favour, inasmuch as the findings of the jury, when rightly interpreted, do not disclose any cause of action against him; and, alternatively, that these findings being against the weight of evidence, the case ought to be sent back for new trial. I have not found it necessary to consider the second of these propositions, having arrived at the conclusion that the first of them is well founded.

The substance of the verdict may be resolved into these three findings: first, that the Glengall Iron Company discharged the respondents from their employment and did not re-engage them; secondly, that the company were induced to do so by

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the appellant; and, thirdly, that the appellant maliciously induced the action of the company. There is no expression in the verdict which can be held, either directly or by implication, to impeach the legality of the company's conduct in discharging the respondents. The mere fact of an employer discharging or refusing to engage a workman does not imply or even suggest the absence of his legal right to do either as he may choose. It is true that the company is not a party to this suit; but it is also obvious that the character of the act induced, whether legal or illegal, may have a bearing upon the liability in law of the person who procured it. The whole pith of the verdict, in so far as it directly concerns the appellant, is contained in the word "maliciously"—a word which is susceptible of many different meanings. The expression "maliciously induce," as it occurs upon the face of the verdict, is ambiguous: it is capable of signifying that the appellant knowingly induced an act which of itself constituted a civil wrong, or it may simply mean that the appellant procured, with intent to injure the respondents, an act which, apart from motive, would not have amounted to a civil wrong; and it is, in my opinion, material to ascertain in which of these senses it was used by the jury.

Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive

may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration in certain exceptional circumstances from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this—that he may with immunity commit an act which is a legal wrong and but for his privilege would afford a good cause of action against him, all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognises, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is usual for him to allege and necessary for him to prove an intent to injure in order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it; and still less that an act in itself lawful is converted into a legal wrong if it was done from a bad motive.

Lord Bowen (at that time Bowen L.J.), in the case of the *Mogul Steamship Co.* v. *McGregor*, laid it down that in order to constitute legal malice the act done must, apart from bad motive, amount to a violation of law. The learned judge, with his accustomed accuracy and felicity said (1): "We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words all of which have accurate meanings, well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in

(1) 23 Q. B. D. 612.

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like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its term the infringement of some right."

The words which I have quoted are in substantial agreement with the language used by Bayley J. in *Bromage* v. *Prosser* (1), to the effect that "malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." According to the learned judge, in order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer in responsibility for its consequences, and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law. Whilst it is true that no act in itself lawful requires an excuse, it is equally true that some acts in themselves illegal admit of a legal excuse, and it is to these that Bayley J. obviously refers.

The root of the principle is that, in any legal question, malice depends, not upon evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed. In my opinion it is alike consistent with reason and common sense that when the act done is, apart from the feelings which prompted it, legal, the civil law ought to take no cognizance of its motive.

It does not appear to me to admit of doubt that the jury, in finding the action of the company to have been maliciously induced by the appellant, simply meant to affirm that the appellant was influenced by a bad motive, namely, an intention to injure the respondents in their trade or calling of shipwrights. At the trial, the case for the plaintiff was conducted, and was submitted to the jury by the learned judge who presided, upon the lines laid down by the Master of the Rolls and Lopes L.J. in *Temperton* v. *Russell*. (2) When the present case was before the Appeal Court, the same doctrine was repeated by the Master of the Rolls and Lopes L.J., and was expounded at great length by Lord Esher. Rigby L.J. deferred to, but did not express his concurrence in, the authority of *Temperton* v. *Russell* (2), which he accepted as binding upon

(1) 4 B. & C. 255.

(2) [1893] 1 Q. B. 715.

him. The doctrine is thus stated by the Master of the Rolls (1): "Now it is clear that merely to persuade a person who has contracted to break his contract gives no cause of action at all. But, if it is done maliciously, for the purpose of injuring the person to whom the advice is given, or for the purpose of injuring some one else, the person against whom the malice is directed and carried out has a cause of action, not on the ground of the persuasion to break the contract, but on the ground of the malice directed against him. To my mind, the result is the same whether the persuasion is to break a contract or not to make a contract. One person has a perfect right to advise another not to make a particular contract, and that other is at perfect liberty to follow that advice. But, if the person uses that persuasion with intent to injure the other, or to injure the other with whom he is going to make the contract, then the act is malicious, and the malice makes that unlawful which would otherwise be lawful." In that state of the law, as expounded in the Appeal Court, it is not surprising to find that Kennedy J., whilst he did not suggest to the jury that the action of the appellant, apart from its motive, constituted a legal wrong, directed them to consider whether the appellant acted "maliciously," and explained that by that word he meant "with the intention and for the purpose of doing an injury to the plaintiffs in their business."

I do not dispute that the law laid down in this case by the presiding judge, and upheld by the Court of Appeal, would justify the verdict of the jury. It simply comes to this: that to induce another person to commit an act which is within his legal right does not in itself afford a cause of action; but that the person who procures his action is guilty of a legal wrong, if he was actuated by an intent to injure, and is liable in reparation to those against whom his evil intent was directed. The words which I have already quoted clearly disclose the doctrine which runs through Lord Esher's judgment. Whether mere "persuasion" or mere "advice" entails liability on the person using them appears to me to be a speculation which it would be unprofitable to discuss, and I shall therefore assume that the

(1) [1895] 2 Q. B. 37.

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words refer to the means used by a person who, in the sense of law, "procures" the act of another. A breach of contract is in itself a legal wrong; and in *Lumley* v. *Gye* (1) it was said by Erle J. (afterwards Erle C.J.): "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong." In the same case it was held by the majority of the learned judges that the defendant was liable in damages upon the express ground that, in knowingly procuring an illegal act, he had committed a wrong which the law regards as malicious. They regarded malice as signifying in law, not that the defendant had been actuated by a bad motive, but that he had procured the commission of an act which he knew to be illegal.

There are, in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not wrongful in so far as he is concerned, it may yet be to the detriment of a third party; and in that case, according to the law laid down by the majority in *Lumley* v. *Gye* (2), the inducer may be held liable if he can be shewn to have procured his object by the use of illegal means directed against that third party.

The question submitted by the House for the opinion of the learned judges who have favoured us with their assistance was: "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" The terms in which the query is framed afford an opportunity, of which some of the learned judges have not been slow to avail themselves, of referring to the evidence of the respondents' witnesses in quest of some fact which might impart a legal and not a conventional meaning to malice as found by the jury. But, according to my apprehension, it was not intended, nor would it be legitimate, in pursuing that investigation to disregard the pleadings of the

(1) 2 E. & B. 216, 232. (2) 2 E. & B. 216.

respondents, or the course which was followed by their counsel, at the trial of the cause. To deal with the case on any other terms would be to start issues which the respondents themselves never raised until they came to the bar of this House, and to apply to these issues evidence which was directed, not to these, but to other points. I therefore find it necessary to express an opinion upon various questions which were canvassed in the course of the argument addressed to us.

First of all, although the statement of claim set forth that the appellant induced the Glengall Iron Company to "break and refuse to perform their contract" with the respondents, the allegation is not borne out by their own evidence. One of them (Taylor) only goes the length of saying that "When a man is once put on he is entitled to come back, day by day, until the job is finished or he is discharged"; and the other (Flood) stated substantially the same thing, with the addition that there was no rule as to the time of notice. Then, at the trial, the cross-examination for the appellant in regard to the matter of contract was stopped by the presiding judge with the observation, "So far as the breach of contract was opened, in fact there was no breach of contract, because the employment was day by day, and terminated at the end of each day." And in charging the jury the learned judge, referring to the averment of breach in the statement of claim, again observed, without objection or exception taken by the respondents' counsel, "that has altogether fallen through, because it is quite clear that there was no contract existing which the defendants or any of them could have induced the Glengall Iron Company to break with the plaintiff."

Assuming that the Glengall Iron Company, in dispensing with the further services of the respondents, were guilty of no wrong, I am willing to take it that any person who procured their act might incur responsibility to those who were injuriously affected by it, if he employed unlawful means of inducement directed against them. According to the decision of the majority in *Lumley* v. *Gye* (1), already referred to, a person who by illegal means, that is means which in themselves are in the nature of

(1) 2 E. & B. 216.

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civil wrongs, procures the lawful act of another, which act is calculated to injure, and does injure, a third party, commits a wrong for which he may be made answerable. So long as the word "means" is understood in its natural and proper sense that rule appears to me to be intelligible; but I am altogether unable to appreciate the loose logic which confounds internal feelings with outward acts, and treats the motive of the actor as one of the means employed by him.

It has been maintained, and some of the learned judges who lent their assistance to the House have favoured the argument, that the appellant used coercion as a means of compelling the Glengall Iron Company to terminate their connection with the respondents; but that conclusion does not appear to me to be the fair result of the evidence. If coercion, in the only legal sense of the term, was employed, it was a wrong done as much to the Glengall Iron Company, who are the parties said to have been coerced, as to the respondents. Its result might be prejudicial to the respondents, but its efficacy wholly depended upon its being directed against and operating upon the company. It must be kept in view that the question of what amounts to wrongful coercion in a legal sense involves the same considerations which I have discussed in relation to the elements of a civil wrong as committed by the immediate actor. According to my opinion, coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespectively of its motive a wrongful act. According to the doctrine ventilated in *Temperton* v. *Russell* (1) and the present case it need not amount to a wrong, but will become wrongful if it was prompted by a bad motive.

It is, in my opinion, the absolute right of every workman to exercise his own option with regard to the persons in whose society he will agree or continue to work. It may be deplorable that feelings of rivalry between different associations of working men should ever run so high as to make members of one union seriously object to continue their labour in company with members of another trade union; but so long as they commit no legal wrong, and use no means which are illegal, they are at

(1) [1893] 1 Q. B. 715.

perfect liberty to act upon their own views. That the boiler-makers who were employed at the Regent Dock, Millwall, did seriously resent the presence among them of the respondents very plainly appears from the evidence of the respondents themselves; and that they would certainly have left the dock had the respondents continued to be employed appears to me to be an undoubted fact in the case. They were not under any continuing engagement to their employers, and, if they had left their work and gone out on strike, they would have been acting within their right, whatever might be thought of the propriety of the proceeding. Not only so; they were, in my opinion, entitled to inform the Glengall Iron Company of the step which they contemplated, as well as of the reasons by which they were influenced, and that either by their own mouth, or, as they preferred, by the appellant as their representative. If the workmen had made the communication themselves, and had been influenced by bad motives towards the respondents, then, according to the law which has been generally accepted by the Courts below, they would each and all of them have incurred responsibility to the respondents. But it was clearly for the benefit of the employers that they should know what would be the result of their retaining in their service men to whom the majority of their workmen objected; and the giving of such information did not, in my opinion, amount to coercion of the employers, who were in no proper sense coerced, but merely followed the course which they thought would be most conducive to their own interests.

I think it is right to observe that if the evidence had, in my opinion, contained statements sufficient to support a charge of coercion, I should have declined in the circumstances of the present case to give effect to it. It is quite true that in the 5th count of the statement of claim intimidation and coercion are alleged; but it is equally true that from the time when that pleading was filed until the second argument upon this appeal the word "coercion" or its equivalents have never been heard except in one instance. It does not even occur in the respondents' case; and the exception to which I have referred is to be found in the charge of the learned judge who, without

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any challenge by the respondents' counsel, made the observation to the jury: "There is no evidence here, of course, of anything amounting to intimidation or coercion in any legal sense of the term." The evidence now relied on as shewing intimidation and coercion was adduced to prove, and was represented to the jury as proving, the malus animus of the appellant, and nothing else. I entertain little doubt as to the incompetency, but none as to the inexpediency of this House entertaining and deciding an issue of fact which, if not formally abandoned, was not brought forward at the trial or submitted to the jury, and that upon evidence which was not directed to it, for the purpose of patching up a verdict which is impeached in point of law.

The doctrine laid down by the Court of Appeal in this case, and in *Temperton* v. *Russell* (1), with regard to the efficacy of evil motives in making—to use the words of Lord Esher—"that unlawful which would otherwise be lawful," is stated in wide and comprehensive terms; but the majority of the consulted judges who approve of the doctrine have only dealt with it as applying to cases of interference with a man's trade or employment. Even in that more limited application it would lead in some cases to singular results. One who committed an act not in itself illegal, but attended with consequences detrimental to several other persons, would incur liability to those of them whom it was proved that he intended to injure, and the rest of them would have no remedy. A master who dismissed a servant engaged from day to day, or whose contract of service had expired, and declined to give him further employment because he disliked the man, and desired to punish him, would be liable in an action for tort. And ex pari ratione, a servant would be liable in damages to a master whom he disliked if he left his situation at the expiry of his engagement and declined to be re-engaged, in the knowledge and with the intent that the master would be put to considerable inconvenience, expense, and loss before he could provide a substitute. If that be the state of the law, it is somewhat remarkable that there is no case to be found in the books of any such action having been sustained. The authority which is mainly relied

(1) [1893] 1 Q. B. 715.

on as supporting the doctrine of the recent decisions is *Keeble* v. *Hickeringill* (1), which was decided by the Court of Queen's Bench about two centuries ago. I am very far from suggesting that the antiquity of a decision furnishes a good objection to its weight; but it is a circumstance which certainly invites and requires careful consideration, unless the decision is clearly in point, and its principle has since been recognised and acted upon.

In *Keeble* v. *Hickeringill* (1) the plaintiff sued for the disturbance of a decoy upon his property, which he used for the purpose of capturing wild fowl and sending them to market. The defendant, who was an adjoining proprietor, had fired guns upon his own land, not with the view of killing game or wild fowl, but with the sole object of frightening the birds, and either driving them out of his neighbour's decoy pond or preventing them from entering it. The act complained of was, in substance, the making of a noise so close to the lands of the plaintiff as to be a nuisance to him. Upon that aspect of the case I do not find it necessary to express any opinion as to the conduct of the defendant; but this much is clear, that no proprietor has an absolute right to create noises upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition he commits a legal wrong, and if he does so intentionally, he is guilty of a malicious wrong, in its strict legal sense. Holt C.J., who delivered the opinion of his Court, treated the case as one of interference with the plaintiff's trade, consisting in the capture and sale of wild fowl. He distinguishes it from the case of invading a franchise, which, I apprehend, would in itself amount to a legal wrong, and thus states the law applicable to it: "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, there an action lies in all cases." I see no reason to doubt that by a "violent act" the learned judge had in view an act of violence done in such circumstances as to make it amount to a legal wrong; and I see as little reason why, in speaking of a "malicious act," he should not be understood as using the word

(1) 11 East, 574, n.

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"malicious" in its proper legal sense, and as referring to other wrongs, not accompanied by violence, but done intentionally, and, therefore, in the eye of the law, maliciously. The object of an act, that is, the results which will necessarily or naturally follow from the circumstances in which it is committed, may give it a wrongful character, but it ought not to be confounded with the motive of the actor. To discharge a loaded gun is, in many circumstances, a perfectly harmless proceeding; to fire it on the highway, in front of a restive horse, might be a very different matter.

The learned Chief Justice proceeds to give various illustrations of the general rule which he had formulated. He first notices a case in which it had been held that a schoolmaster had no cause of action against a defendant who had attracted his pupils and injured his school by setting up a rival establishment, a proceeding which was obviously in the ordinary course of competition, and then adds: "But suppose Mr. Hickeringill should lie in the way with his guns, and fright the boys from going to school, and their parents would not let them go thither; sure that schoolmaster might have an action for the loss of his scholars." From that observation I see no reason to differ, because, in my opinion, frightening a child with a gun so that it cannot get to school is in itself a violent and unlawful act, directed both against the child and its schoolmaster. The learned judge then refers to three instances in which the defendant would be liable in an action upon the case: (1.) where he obstructs a person in charge of a horse, who is taking it to a market for sale, and prevents his reaching the market, thereby depriving the market owner of his dues; (2.) where, to the detriment of a proprietor, he by threats frightens away his tenants-at-will; and (3.) when he beats a servant, and so hinders him from taking his master's tolls. It must be observed that, apart from any question of motive, all these cases involve the use of means in themselves illegal—obstruction, coercion by means of threats, and personal assault.

But assuming, what to my mind is by no means clear, that *Keeble* v. *Hickeringill* (1) was meant to decide that an evil

(1) 11 East, 574, n.

motive will render unlawful an act which otherwise would be lawful, it is necessary to consider how far that anomalous principle has been recognised in subsequent decisions. Laying aside the recent decisions which are under review in this appeal, only one case has been cited to us in which the Court professed that they were guided by the reasoning of Holt C.J. That instance is to be found in *Carrington* v. *Taylor* (1), a decision which I venture to think that no English Court would at this day care to repeat. The facts of the case resembled those which occurred in *Keeble* v. *Hickeringill* (2) in this single respect, that the plaintiff was the owner of a decoy for wild fowl. The defendant was the owner of a boat in which he rowed along the coast and earned a livelihood by shooting wild fowl for the market, which he was lawfully entitled to do. But some of the shots fired by him in the pursuit of that occupation had the effect of scaring birds which otherwise would or might have entered the plaintiff's decoy; and, in respect of that disturbance, he was held liable in damages to the plaintiff. Whatever construction might be put upon the judgment of Holt C.J., it does not appear to me to contain a single expression which would justify that result. I am not surprised to find that an eminent judge, with whose opinion as a whole I am unable to concur, has had the courage to express his dissent from the judgment in *Carrington* v. *Taylor* (1), as he failed "to see what wrong the defendant in that case had done." To my mind the case is of considerable importance, because it shews that in the year 1809 the Court of Queen's Bench did not regard *Keeble* v. *Hickeringill* (2) as establishing the doctrine that a lawful act, done with intent to injure, will afford a cause of action. In the case before them there was no allegation and no evidence of any intent to injure the plaintiff's decoy. The sole motive of the defendant in firing his gun was to earn his livelihood by killing wild fowl for the market. I cannot avoid the conclusion that the learned judges accepted *Keeble* v. *Hickeringill* (2) as an authority to the effect that, apart from any question of motive, the disturbance of a lawful decoy is an illegal invasion of the private right of its proprietor.

(1) 11 East, 571.

(2) 11 East, 574, n.

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A variety of well-known cases, including even *Lumley* v. *Gye* (1), were relied on by the respondents as shewing that the so-called principle of *Keeble* v. *Hickeringill* (2) has been from time to time applied by the English Courts since the date of that judgment. Except in the case of *Carrington* v. *Taylor* (3), which I have already noticed, I have been unable to discover in these authorities, which I do not consider it necessary to examine in detail, any trace of the doctrine for which the respondents contend until recent years, when it is first firmly foreshadowed in a dictum which occurs in *Bowen* v. *Hall* (4), and is subsequently developed in *Temperton* v. *Russell* (5) and in the present case. The authorities antecedent to *Bowen* v. *Hall* (4), as well as that decision itself, are all cases belonging to one or other of these three classes: (1.) cases of privilege, where the perpetrator of an act which per se constituted a legal wrong was protected from its usual consequences in the event of its being proved that he was actuated by an honest desire to fulfil a public or private duty; (2.) cases in which the act complained of was in itself a plain violation of private right; and (3.) cases in which an act detrimental to others, but affording no remedy against the immediate actor, had been procured by illegal means.

The early case of *Garret* v. *Taylor* (6) furnishes an apt illustration of the third class. According to the report, which is very brief, the plaintiff, a quarryman, complained that the defendant had, by threats to "mayhem" and annoy them with litigation, induced or coerced some of his customers to discontinue buying stones from his quarry. Decree passed in absence, and the case was reheard on an appeal brought by the defendant in arrest of judgment upon the ground that the declaration did not disclose any cause of action. The declaration (7) discloses facts which, if true, as they were necessarily assumed to be, did amount to illegal means used in order to influence the action of the plaintiff's customers. One learned judge has assumed that the judgment went on the principle

(1) 2 E. & B. 216.
(2) 11 East, 574, n.
(3) 11 East, 571.
(4) 6 Q. B. D. 333.
(5) [1893] 1 Q. B. 715.
(6) Cro. Jac. 567.
(7) 2 Roll. Rep. 162.

that every man "has a right to carry on his trade without disturbance," a proposition which was not involved in the case, but which I should not demur to if he meant "illegal" disturbance. The decision really went upon the terms of the declaration, which appears to me to disclose a clear case of the employment of unlawful means. I am not at present prepared to hold that threats of vexatious litigation, which might cause anxious apprehension in the minds of many, will in no circumstances amount to unlawful influence; but I entertain no doubt that these, when coupled with serious threats of personal violence going the length of mutilation or demembration, do, when the party threatened is overcome by and yields to them, constitute legal coercion.

Tarleton v. *M'Gawley* (1) is a case of the same complexion. Two British ships, the *Othello* and the *Bannister*, were lying near to each other off the Calabar coast, both engaged in the same kind of adventure, that of bartering their cargoes for palm-oil and other West African produce. A canoe manned by natives desiring to trade was approaching the *Bannister* for that purpose, when the master of the *Othello* directed against it and fired a cannon loaded with gunpowder and shot and killed one of its crew, an outrage which occasioned such a panic amongst the native tribes that the season's trade of the *Bannister* was lost. The master of the *Othello* was held to be responsible for that result, which was the direct and natural consequence of his wrongful and criminal act. The case was just the same as if some person had persisted in firing bullets at all and sundry who were about to enter a particular shop with the effect of driving away its customers and ruining the shopkeeper's business. Such an act could not be reasonably described as lawful but for the motive by which it was dictated.

I have already indicated that, in my opinion, no light is thrown upon the decision of the present question by *Pitt* v. *Donovan* (2) and other cases of that class. The defendant had in that case represented, contrary to the fact, that the plaintiff was insane at the time when he executed a particular deed.

(1) 1 Peake, N. P. C. 270. (2) 1 M. & S. 639.

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The communication was made to a person to whom the defendant was under a legal duty to make the disclosure if it had been true; and the defendant was in law absolved from the ordinary consequences of his having circulated a libel which was false and injurious, if he honestly believed it to be true. The law applicable in cases of that description is, I apprehend, beyond all doubt; but the rule by which the law in certain exceptional cases excuses the perpetration of a wrong, by reason of the absence of evil motive, is insufficient to establish or to support the converse and very different proposition, that the presence of an evil motive will convert a legal act into a legal wrong. *Lumley* v. *Gye* (1) is a weighty authority in this branch of the law, but it does not lend any aid to the respondents' argument. It was an action of damages against a defendant who had induced a professional singer to break her engagement with the plaintiff to his detriment, and it was resisted mainly upon the ground that the engagement broken did not constitute the relationship of master and servant between the contracting parties. That plea was overruled, and the defendant found liable. The principle of the decision (from which Coleridge J. alone dissented) was clearly explained by Mr. Justice (afterwards Chief Justice) Erle, whose opinion is in complete accordance with the views expressed by the other learned judges who constituted the majority of the Court. He said: "The authorities are numerous and uniform that an action will lie against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed, and the present case is the same." The learned judge went on to say, in language which I have already referred to: "It is clear that the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong." These statements embody an intelligible and a salutary principle, and they contain a full explanation of the law upon which the case was decided.

(1) 2 E. & B. 216.

He who wilfully induces another to do an unlawful act which, but for his persuasion, would or might never have been committed, is rightly held to be responsible for the wrong which he procured. None of the learned judges made any reference to the case of *Keeble* v. *Hickeringill* (1), and not a single expression is to be found in their opinions tending to suggest that an injurious motive can impart a wrongful character either to a lawful act or to its procurement by means which are not in themselves illegal.

In *Bowen* v. *Hall* (2) the wrong complained of was the intentional inducing of a breach of contract to the detriment of the plaintiff, who was obviously entitled to succeed if *Lumley* v. *Gye* (3) had been well decided. According to the opinion expressed by Erle C.J. and the other judges of the majority in that case, the defendant in *Bowen* v. *Hall* (2) had been guilty of a wrong which was in the sense of law malicious because he had knowingly procured the commission of an illegal act. The judgment in *Lumley* v. *Gye* (3) was followed by Earl Selborne and by Lord Esher (at that time Brett L.J.), whilst Coleridge C.J. adhered to the opposite view, which had been taken by Coleridge J. Lord Esher, in delivering the judgment of Earl Selborne and himself, substantially affirms the reasoning of the majority in *Lumley* v. *Gye* (3); but there are one or two sentences in his judgment relating to points with which the learned judges who decided that case did not deal, and which were not raised by the facts either of *Lumley* v. *Gye* (3) or of the case before him. His Lordship said: "Merely to persuade a man to break his contract may not be wrongful in law or fact as in the second case put by Coleridge J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." These words are obviously susceptible of two

(1) 11 East, 574, n.
(2) 6 Q. B. D. 333.
(3) 2 E. & B. 216.

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very different constructions, according as they are understood to refer to the procurement of an act which is in violation of the law, and therefore a legal wrong, or to the procurement of a lawful act. Primâ facie, they would have appeared to me to refer to the procuring of an illegal act, because the assumption upon which the whole passage is framed is that there has been successful persuasion to break a contract, which is an undoubted violation of the law; and in that case there would be a malicious wrong as it is defined in *Lumley* v. *Gye*. (1) But the words have now been explained by their author to mean, not merely that the procuring of an unlawful act with intent to injure is a malicious wrong, giving a good cause of action, but that the presence of injurious intent in the mind of the procurer gives a good cause of action, although the act procured is in itself lawful. In that aspect of them, the words can only be regarded as obiter dicta, because no such question was raised by the circumstances of the case.

I do not think it necessary to notice at length *Temperton* v. *Russell* (2), in which substantially the same reasons were assigned by the Master of the Rolls and Lopes L.J. as in the present case. It is to my mind very doubtful whether in that case there was any question before the Court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful. The only findings of the jury which the Court had to consider were: (1.) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2.) that the defendants had maliciously conspired to induce, and had thereby induced, certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye*. (1) According to the second finding, the persons induced merely refused to make contracts, which was not a legal wrong on their part; but the defendants who induced were found to have accomplished their object, to the injury of the plaintiffs, by means of unlawful conspiracy—a clear ground of liability according to

(1) 2 E. & B. 216. (2) [1893] 1 Q. B. 715.

Lumley v. *Gye* (1) if, as the Court held, there was evidence to prove it.

I am quite alive to the fact that the question which we have to decide is one of importance, and also that it has never been previously considered by this House. Having come to the conclusion, with the majority of your Lordships who have heard the appeal, that the doctrine advanced by the respondents is neither sound in principle nor supported by authority, I move that the order appealed from be reversed, and judgment entered for the appellant, and that the appellant have his costs of this appeal, and costs in both Courts below, including the costs of the trial.

LORD ASHBOURNE. (2) My Lords, the controversy in this case is between the plaintiffs, who are shipwrights and members of the Shipwrights' Provident Union, and the defendant Allen, a member and the London delegate of the Independent Society of Boilermakers and Iron and Steel Shipbuilders. It is not a dispute between employers and employed—between capital and labour—but rather one between the members of one trade union and of another trade union; and on the facts of the case there is little real difference. The question is now narrowed to that presented to Her Majesty's judges, whose opinions afford such valuable aid in forming a conclusion in the case.

The plaintiffs for some years previous to 1894 had pursued the calling of shipwrights in the port of London. They had been taught to work both in iron and wood in all kinds of ships, and they had found occasional employment at the Nelson Docks at Rotherhithe, where wood and iron work was commonly done by the same shipwrights. In the north of England the wood and iron work is done generally, if not exclusively, by separate sets of men, and the same is the practice in many London docks, including the Glengall Company's Regent Dock. There was apparently much jealousy between the two unions: the ironworkers held that the proper business of shipwrights was to work in wood, and that shipwrights who worked in iron

(1) 2 E. & B. 216.
(2) Read by Lord Morris in Lord Ashbourne's absence.

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trespassed on the trade of the boiler-makers' union. The plaintiffs had been frequently employed at the Glengall Company's Docks, but they always worked there solely at woodwork. They had been taken on "for the job" on April 12, 1894, to assist in the repair of the *Sam Weller*; and on the 13th they were at work on woodwork with twenty-two other shipwrights, and at the same time a large body of boiler-makers were engaged on ironwork.

The plaintiffs were employed in the usual and customary way "for the job," and were expected to come day by day until it was finished, or they were discharged by their employers. The men had a reasonable and probable expectation of continued employment until the job was finished, and, according to Allen, they should not themselves leave their work "without tangible reasons."

The plaintiffs for some months immediately before their employment on the woodwork of the *Sam Weller* had been working at the Nelson Dock, doing there both wood and iron work. This fact having become known to Elliott, then engaged in the ironwork of the *Sam Weller* and a member of the boiler-makers' society, he communicated with the defendant. What the defendant then did has led to this action.

On April 13, after seeing Elliott, he had an interview with Mr. Halkett, the managing director of the Glengall Company, at his office. He told him that, as the two plaintiffs had been guilty of doing ironwork at the Nelson Dock of Mills & Knight, the iron-men would leave unless the plaintiffs were discharged; that the men would cease to work in any yard the plaintiffs went to; that they would not be allowed to work anywhere in the London Docks; that it was not easy to know men, but the plaintiffs were known, and the same action would be taken wherever they got employment.

Mr. Halkett did not want the business of the yard stopped; and, being told by the defendant there was "no option," reluctantly ordered the plaintiffs to be discharged that night and not to be employed again. The plaintiffs at the time of their discharge were working on wood; the boilermakers had no complaint with what they were then doing, and the defendant's

action was to "punish" them for what they had done in the course of a previous employment in another yard. The plaintiffs accordingly were dismissed, and a ban was placed on their future employment.

The natural result of the defendant's words and intervention would be that the plaintiffs would not then or in future be free to carry on their lawful trade—even confining themselves to woodwork—wherever boiler-makers were employed. This action was not an effort, by competition, to enable the boiler-makers to get the work instead, but to punish the plaintiffs by causing the employment of other shipwrights in their room.

Was this evidence fit to be submitted to the jury of coercion by the defendant on the Glengall Company to terminate their employment of the plaintiffs? Was there evidence that the defendant intimidated and coerced the Glengall Company not to enter into new contracts with the plaintiffs? Was there evidence that the defendant maliciously induced the company not to engage the plaintiffs? I am unable myself to see room for doubt that there was ample evidence of such conduct on the part of the defendant, and there is no question that it damaged the plaintiffs. I should infer even from the evidence of the defendant himself that the rules of the boiler-makers' society, as was clearly testified by their general secretary and chairman, would not support punishing the plaintiffs for their past action by procuring their dismissal from an employment where they were working blamelessly. I should also gather from his evidence that the defendant himself on consideration would not say that such conduct was right. He was asked, "Were the men right or wrong, according to your opinion, in declining to act with Flood and Taylor because of something they had done in the past?" And his reply was, "That would be wrong, of course, according to the rules of our society, if they left their work; but they did not take such an action." But the question here is not on the rules of the society, or on the opinions of the defendant on reflection, but whether there was evidence of his alleged conduct for the jury. The question is, Have the plaintiffs a remedy for their loss found to have been caused by the defendant?

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The plaintiffs had, in my opinion, a clear right to pursue their lawful calling, to have the full benefit of their employment, and the right to enjoy the legitimate, reasonable, and probable expectation of a continuance of their employment. It would be, I think, an unsatisfactory state of the law that allowed the wilful invader of such a right without lawful cause or justification to escape from the consequences of his action—that would not hold him liable for maliciously inducing men being denied their accustomed employment, and that would not afford to those he had injured legal grounds of action.

The law is stated with precision and vigour by Sir William Erle in his work on Trade Unions (p. 12): "Every person has a right under the law, as between him and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong to be remedied either by action or by indictment, as the case may be."

In my opinion this is a clear statement of the law, and I have heard no satisfactory attempt to answer or explain it away. It is supported not only by good sense and by those considerations of justice and fair play one would expect to find in any legal system, but by a mass of powerful authority. Holt C.J., in the case so often referred to (*Keeble* v. *Hickeringill* (1)), laid it down with clearness and certainty that "he that hinders another in his trade or livelihood is liable to an action for so doing."

In no subsequent decision of any Court has doubt been thrown upon the effect of that authority, or a suggestion made that

(1) 11 East, 574, n.

the weighty conclusions of Holt C.J. could with advantage to our law be reviewed or pushed aside. The reason, it has not been questioned, is because, as I conceive, it rested firmly on the great common law principle that every man has a right to carry on his trade without disturbance. The case of *Tarleton* v. *M'Gawley* (1), decided in 1794, strongly supports the view that such a right was the settled law of this country, for it was then held that an action lay against the master of a vessel for purposely firing a cannon at negroes and thereby preventing them from trading with the plaintiff; and it was pointed out that "the defendant had expressed an intention not to permit any to trade until a debt due from the natives to himself was satisfied."

I need not go in detail through the celebrated case of *Lumley* v. *Gye* (2), which for nearly half a century has passed into the regular current of legal authority, and which was followed by Lord Selborne and Lord Esher in *Bowen* v. *Hall.* (3)

In the *Mogul Case* (4) it was apparently accepted as undoubted law that a trader has a right to carry on his business without disturbance, except in the way of fair competition. Bowen L.J. there says: "No man, whether trader or not, can justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by shew of violence; the obstruction of actors on the stage by preconcerted hissing; the disturbance of wild fowl in decoys by the firing of guns; the impeding or threatening servants or workmen; the inducing persons under personal contracts to break their contracts; all are instances of such forbidden acts." It is worthy of note that this great judge refers expressly to the case of *Keeble* v. *Hickeringill* (5) as clear and accepted law; as did Lord Bramwell and Lord Field in this House.

(1) 1 Peake, N. P. 270.
(2) 2 E. & B. 216.
(3) 6 Q. B. D. 333.
(4) 23 Q. B. D. 598.
(5) 11 East, 574, n.

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The fact that the plaintiffs could make no claim against the Glengall Company, and that what the company did was, as between them and the plaintiffs, not unlawful, cannot, I think, exonerate the defendant from liability for his own wrongful conduct. On the question of the evidence of "malice" in the defendant, I do not think I could with advantage add anything to what has been so well and so fully said by my noble and learned friend on the woolsack.

The last case I desire to refer to is *Temperton* v. *Russell* (1), tried before Collins J., whose direction was confirmed by the Court of Appeal, where Lord Esher gave it as his opinion that there was no real distinction between a malicious inducement to break a contract and a malicious inducement not to enter into new contracts of service. The consequences to a workman so treated are alike disastrous: he depends for his bread upon his existing and future contracts. To intimidate an employer into breaking a contract with a particular workman, and to coerce or maliciously induce an otherwise willing employer not to give him future employment, alike does that workman serious damage in his trade and prevents him from earning his wages. The object of the wrongdoer is the same in each case. Here the motive of the defendant was founded on the determination to inflict punishment on the plaintiffs for their past action by driving them out of their employment.

In my opinion there was evidence that the defendant acted without legal excuse or justification in invading the right of the plaintiffs to exercise their calling without hindrance; and there was evidence to go to the jury that the defendant intimidated and coerced or maliciously induced the Glengall Iron Company not to enter into new contracts with the plaintiffs.

I entirely concur in the conclusion of the Lord Chancellor, and think that the appeal should be dismissed.

LORD HERSCHELL. My Lords, in this case the respondents, who were the plaintiffs in the action, were members of the shipwrights' union. The appellant is an official—the delegate of the London district—of the United Society of Boiler Makers

(1) [1893] 1 Q. B. 715.

and Iron Ship Builders. It appears that before the time of the occurrences which gave rise to this action a controversy had existed between these unions and the members of whom they were respectively composed. The boiler-makers' union insisted that it was not a legitimate part of the work of a shipwright to execute ironwork upon ships, and that they ought to confine themselves to the woodwork. On the other hand, the shipwrights' union contended that ironwork, as well as woodwork, fell properly within their craft. In April, 1894, the respondents were engaged to do certain piecework upon a ship called the *Sam Weller*, in the Regent's Dock, Millwall, for the Glengall Iron Company. They were employed only upon woodwork. Just before this engagement they had been doing iron shipbuilding work for another firm. This was known to the boiler-makers and ironworkers engaged upon the *Sam Weller*, who were much annoyed at the presence in their midst of men who they considered had been unfairly trenching upon their trade or calling. It is clear that they were indisposed to work in company with them. In consequence of the feeling which had been excited, one of the ironworkers telegraphed to the appellant to come to the ship. On his arrival, he learned that the ironworkers, or some of them, had determined to throw down their tools and leave at once. He told the ironworker who had telegraphed to him to inform them that if they did so he should use his influence with the executive council of the union to deprive them of any benefit from that society. He then proceeded to an interview with the manager and foreman of the Glengall Company. There is some conflict of evidence as to what passed at that interview—whether the appellant intimated that the boiler-makers engaged on the ship would be called out if the respondents were allowed to continue to work on board her, or whether he merely represented that the men belonging to his union would cease to work for the company if the employment of the respondents continued. I shall return to this point presently. It is, at all events, clear that the manager of the Glengall Company came to the conclusion that if he continued to employ the respondents the boiler-makers would cease to work for him. In view of this, he determined that the

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company would not continue the employment of the respondents. It is said that they were "discharged" in consequence of the defendant's action. This is true in the sense that they were no longer employed; it is untrue if intended to imply that any right by contract or otherwise was violated by their discharge.

In consequence of the step taken by the Glengall Company this action was brought. Besides the appellant, Jackson and Knight, the chairman and secretary of the union, were made defendants. Kennedy J., before whom the case was tried, left to the jury the following questions: (1.) Did the defendant Allen maliciously induce the Glengall Iron Company to discharge the plaintiffs from their employment? (2.) Did he maliciously induce the Glengall Iron Company not to engage the plaintiffs, or either of them? The jury answered both questions in the affirmative, and assessed the damages at 20*l.* for each plaintiff. They also found that the other defendants did not authorize the defendant Allen in acting as he did, and that the settlement of the dispute was a matter within the discretion of Allen. Upon these findings the learned judge entered judgment for the plaintiffs against the appellant, but entered judgment for the other defendants.

This judgment was affirmed by the Court of Appeal. Rigby L.J., however, only concurred in the judgment because he regarded the question as practically settled by the judgment in *Temperton* v. *Russell.* (1)

It was argued at the bar for the respondents that the jury must be taken to have adopted the view that the evidence for the plaintiffs was correct, and that the appellant did intimate that he would call the boiler-makers out if the company continued to employ the respondents. In my opinion, it is not material whether the account of the conversation given by the appellant or by the manager of the ironworks is the correct one; but I cannot concur in the contention of the respondents that the jury must be taken to have adopted the latter account.

The learned judge, no doubt, indicated an opinion, which I am not able to share, that it would have a bearing on the question whether the appellant induced the company to decline

(1) [1893] 1 Q. B. 715.

to employ the respondents, and also, on the question of malice, whether the one account of the conversation or the other was the correct one. But he did not lay this down as a matter of law; he left it for the jury to decide. Under these circumstances, I do not think the case can properly be dealt with on the assumption that the finding of the jury involves a finding that the version of what passed given by the plaintiffs' witnesses is the correct one. I have said that I do not share the opinion entertained by the learned judge that the point upon which there was a conflict of testimony had a bearing upon the question whether the company were induced by the appellant to cease to employ or decline employing the respondents. What induced them to do so is plain: it was their belief that if they employed the respondents the ironworkers would cease to work for them, and a sense of the inconvenience which this would cause. It is certain that this belief was engendered by the statement which the appellant made to them. They would be equally induced to take the action, and induced in precisely the same sense, whether the representation was that the ironworkers would cease working, or that they would be called out. Nor was the motive different, whichever representation was made. In my judgment, there can be no difference in the legal effect of these two representations. If the one would give a cause of action, the other, in my opinion, would equally do so.

The question is whether the findings of the jury entitled the plaintiffs to judgment. After a careful and prolonged consideration of the arguments addressed to your Lordships when the case was first presented at the bar of this House, I arrived at the conclusion that the question must be answered in the negative. The reasons for this conclusion, which I then prepared, are in substance those to which I now invite your Lordships' attention. I have since carefully reconsidered the matter in view of the opinions which have been expressed by the learned judges who were summoned on the occasion of the second argument at the bar, but I have seen no ground for changing the opinion at which I had previously arrived. I have, however, added some observations upon the views presented by the learned judges.

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It is to be observed, in the first place, that the company in declining to employ the plaintiffs were violating no contract—they were doing nothing wrongful in the eye of the law. The course which they took was dictated by self-interest: they were anxious to avoid the inconvenience to their business which would ensue from a cessation of work on behalf of the iron-workers. It was not contended at the bar that merely to induce them to take this course would constitute a legal wrong, but it was said to do so because the person inducing them acted maliciously. The Master of the Rolls declined in the present case to define what was meant by "maliciously": he considered this a question to be determined by a jury. But if acts are, or are not, unlawful and actionable, according as this element of malice be present or absent, I think it is essential to determine what is meant by it. I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious. No one would know what his rights were. The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety might differ from our own. However malice may be defined, if motive be an ingredient of it, my sense of the danger would not be diminished.

The danger is, I think, emphasised by the opinions of some of the learned judges. In a case to which I shall allude immediately the Master of the Rolls included within his definition of malicious acts persuasion used for the purpose "of benefiting the defendant at the expense of the plaintiff." Wills J. thinks this "going a great deal too far," and that, whether the act complained of was malicious depends upon whether the defendant has, in pursuing his own interests, "done so by such means and with such a disregard of his neighbour as no honest and fair-minded man ought to resort to." Here it will be seen that malice is not made dependent on motive. The assumed motive is a legitimate one—the pursuit of one's own interest. The malice depends on the means used and the disregard of one's neighbour, and the test of its existence is whether these

are such as no honest and fair-minded man ought to resort to. There is here room for infinite differences of opinion. Some, I dare say, applying this test would consider that a strike by workmen at a time damaging to the employer, or a "lock-out" by an employer at a time of special hardship to the workmen, were such means, and exhibited such a disregard of his neighbour as an honest and fair-minded man ought not to resort to. Others would be of the contrary opinion. The truth is, this suggested test makes men's responsibility for their actions depend on the fluctuating opinions of the tribunal before whom the case may chance to come as to what a right-minded man ought or ought not to do in pursuing his own interests. Again, the late Cave J. (whom I cannot name without deploring his loss) expressed the view that the action of the appellant might have been justified on the principles of trade competition if it had been confined to the time when the men were doing ironwork, but that it "was without just cause or excuse, and consequently malicious," inasmuch as the respondents were not at the time engaged upon ironwork. On the other hand, it is evident, from the reasoning of some of the learned judges, who think the respondents entitled to succeed, that they would not be prepared to adopt this distinction, and would regard the act as "malicious" in either case.

The present case was treated in the Court below as governed practically by the previous decisions of the same Court in *Bowen* v. *Hall* (1) and *Temperton* v. *Russell*. (2) The former of these cases was an action brought against the defendant for maliciously inducing a person who had entered into a contract of service with the plaintiff to break that contract. It raised, for the first time in the Court of Appeal, the question whether *Lumley* v. *Gye* (3) was rightly decided. The Master of the Rolls (then Brett L.J.) delivered the judgment of the Court, in which the late Lord Selborne concurred, the late Lord Chief Justice dissenting. The law was thus laid down in the judgment of the majority of the Court: "Merely to persuade a person to break his contract may not be wrongful in law or fact as in the second

(1) 6 Q. B. D. 333. (2) [1893] 1 Q. B. 715.
(3) 2 E. & B. 216.

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case put by Coleridge J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act, if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact."

This case was followed, and the view of the law thus expressed was reasserted by the Master of the Rolls in *Temperton* v. *Russell.* (1) It will be seen that "malicious" is here defined as the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff. It is said that a malicious act thus defined is, in law and in fact, a wrong act, and therefore a wrongful act. I am not sure that I quite understand what is meant by saying that it is "in fact" a wrong act, as distinguished from its being so "in law," and that because so wrong it is therefore wrongful. I can only understand it as meaning that it is an act morally wrong. The law certainly does not profess to treat as a legal wrong every act which may be disapproved of in point of morality; but, further, I cannot agree that all persuasion where the object is to benefit the person who uses the persuasion at the expense of another is morally wrong. Numberless instances might be put in which such persuasion, which is of constant occurrence in the affairs of life, would not be regarded by any one as reprehensible. The judgment is grounded almost wholly upon the presence of this element—that the purpose of the inducement is to injure the plaintiff, or to benefit the defendant at his expense. The fact that the act which is induced by the persuasion is the breach of a contract with the plaintiff is treated as a subordinate matter which without this element would not be a wrong act, or an act wrongful and therefore actionable. The motive of the person who did the act complained of was thus treated as the gist of the action. In *Temperton* v. *Russell* (1), the further step was taken by the majority of the Court, A. L. Smith L.J. reserving his opinion on the point, of asserting that it was immaterial that the act induced was not the

(1) [1893] 1 Q. B. 715.

breach of a contract, but only the not entering into a contract, provided that the motive of desiring to injure the plaintiff, or to benefit the defendant at the expense of the plaintiff, was present. It seems to have been regarded as only a small step from the one decision to the other, and it was said that there seemed to be no good reason why, if an action lay for maliciously inducing a breach of contract, it should not equally lie for maliciously inducing a person not to enter into a contract. So far from thinking it a small step from the one decision to the other, I think there is a chasm between them. The reason for a distinction between the two cases appears to me to be this: that in the one case the act procured was the violation of a legal right, for which the person doing the act which injured the plaintiff could be sued as well as the person who procured it; whilst in the other case no legal right was violated by the person who did the act from which the plaintiff suffered: he would not be liable to be sued in respect of the act done, whilst the person who induced him to do the act would be liable to an action.

I think this was an entirely new departure. A study of the case of *Lumley* v. *Gye* (1) has satisfied me that in that case the majority of the Court regarded the circumstance that what the defendant procured was a breach of contract as the essence of the cause of action. It is true that the word "maliciously" was to be found in the declaration the validity of which was then under consideration; but I do not think the learned judges regarded the allegation as involving the necessity of proving an evil motive on the part of the defendant, but merely as implying that the defendant had wilfully and knowingly procured a breach of contract. Indeed, Crompton J. appears to me to indicate this in express terms. He says: "It must now be considered clear law that a person who wrongfully and maliciously, or which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after he has quitted it, and during the time stipulated for as the period of service,

(1) 2 E. & B. 216.

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whereby the master is injured, commits a wrongful act for which he is responsible at law." He then proceeds to consider whether the same law is applicable to a contract for future service in the case of a theatrical singer.

Erle J. said: "The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for there the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract by putting an end to the relation of employer and employed." Not a word, be it observed, is said about the motive as constituting an element in the wrongful act. This is made, if possible, clearer by the answer which the learned judge gives to the objection that this class of actions for procuring the breach of a contract of hiring rested upon no principle, and ought not to be extended beyond the cases theretofore decided relating to trade, manufacture, or household service. "The answer," said the learned judge, "appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring the nature of the service contracted for is immaterial."

I think the view of Wightman J. was substantially the same. He relies much upon the case of *Winsmore* v. *Greenbank*. (1) In relation to that case he says: "It was primâ facie an unlawful act of the wife to live apart from her husband, and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act; and as damage to the plaintiff was thereby occasioned, an action on the case was maintainable. This case appears to me to be an exceedingly strong authority in the plaintiff's favour. It was undoubtedly, primâ facie, an unlawful act on the part of Miss Wagner to break her contract, and therefore a tortious act of the defendant maliciously to procure her to do so."

It is true the learned judge here uses the word "maliciously,"

(1) Willes, 577.

but I think he means no more by this than "wilfully and knowing that he was procuring an unlawful act." The essence of the tort was manifestly regarded by the learned judge as the procuring one person to do an unlawful act to the injury of another. In *Winsmore* v. *Greenbank* (1), which the learned judge relied upon as a strong authority in support of the plaintiff's case, there was not even an allegation of malice in the first count. The allegation was that the defendant "unlawfully and unjustly" procured a wife not to return to her husband, whereby he was damnified. Willes C.J. in his judgment said, in answer to objections that were taken to the first count: "It must be an unlawful procuring, and it need not be shewn on the pleadings how it is unlawful. It was said that it was necessary for the plaintiff to add 'by false insinuations,' but it is not material whether they were true or false. If they were true, and by means of them the defendant persuaded the plaintiff's wife to do an unlawful act, it was unlawful in the defendant."

Upon a review, then, of the judgment in *Lumley* v. *Gye* (2), I am satisfied that the procuring what was described as an unlawful act—namely, a breach of contract, was regarded as the gist of the action. I think the judgment would have been precisely the same if, instead of the word "maliciously," the words "wilfully and with notice of the contract," had been found in the declaration. Every word of the reasoning of the three learned judges would have been equally applicable to that case. I am not concerned now to inquire whether the decision in *Lumley* v. *Gye* (2) was right. I admit the force of the reasons given by the learned judges for holding that an action lies not only against a person who breaks a contract, but against anyone procuring a breach of contract to the detriment of the plaintiff. There are, however, arguments the other way, and I must not be understood as expressing an opinion one way or the other, whether such an action can be maintained.

It is certainly a general rule of our law that an act primâ facie lawful is not unlawful and actionable on account of the

(1) Willes, 577. (2) 2 E. & B. 216.

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motive which dictated it. I put aside the case of conspiracy, which is anomalous in more than one respect.

It has recently been held in this House, in the case of *Bradford Corporation* v. *Pickles* (1), that acts done by the defendant upon his own land were not actionable when they were within his legal rights, even though his motive were to prejudice his neighbour. The language of the noble and learned Lords was distinct. The Lord Chancellor said: "This is not a case where the state of mind of the person doing the act can affect the right. If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good the motive might be, he would have no right to do it." The statement was confined to the class of cases then before the House; but I apprehend that what was said is not applicable only to rights of property, but is equally applicable to the exercise by an individual of his other rights.

The common law on the subject was emphatically expressed by Parke B. in delivering the judgment of the Court in *Stevenson* v. *Newnham*. (2) In that case the question was whether a declaration was good which averred that the defendant "maliciously" distrained for more rent than was due. It was held that the allegation of malice did not make it good. Parke B. said: "An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent."

More than one of the learned judges who were summoned refers with approval to the definition of malice by Bayley J. in the case of *Bromage* v. *Prosser* (3): "Malice in common acceptation of the term means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse." It will be observed that this definition eliminates motive altogether. It includes only "*wrongful*" acts intentionally done. I may remark in passing that I am quite unable to see how the definition assists the respondents. It seems to me to tell the other way. In the present case the contention is that the malicious motive makes "wrongful" an act that otherwise would not be so.

(1) [1895] A. C. 587, 594. (2) 13 C. B. 285, 297.
(3) 4 B. & C. 247, 255.

It may be convenient here to refer to *Green* v. *London General Omnibus Co.* (1), which was relied on as shewing that a malicious motive may make actionable acts otherwise innocent. In my opinion it affords no support to such a proposition. Acts were charged in the declaration which manifestly interfered with the plaintiff in the free use of the highway to which he was entitled. The declaration averred that he was obstructed in the use of it. It was demurred to on the ground that a corporation could not be guilty of malice, and that this was of the essence of the cause of action. The decision was only that the declaration was good. It was not held that a malicious motive was essential. Erle C.J., in delivering the judgment of the Court, stated as the ground of the demurrer, that the declaration charged "a wilful and intentional wrong," and that the defendants being a corporation could not be guilty of such a wrong. He obviously gave the averment of malice the meaning attributed to it by Bayley J. in the case just referred to—namely, that the wrongful acts were done intentionally.

Great stress was laid at the bar on the circumstance that in an action for maliciously and without reasonable and probable cause putting in motion legal process an evil motive is an essential ingredient. I have always understood, and I think that has been the general understanding, that this was an exceptional case. The person against whom proceedings have been initiated without reasonable and probable cause is primâ facie wronged. It might well have been held that an action always lay for thus putting the law in motion. But I apprehend that the person taking proceedings was saved from liability if he acted in good faith, because it was thought that men might otherwise be too much deterred from enforcing the law, and that this would be disadvantageous to the public. Some of the learned judges cite actions of libel and slander as instances in which the legal liability depends on the presence or absence of malice. I think this a mistake. The man who defames another by false allegations is liable to an action, however good his motive, and however honestly he believed in the statement he made. It is true that in a limited class of

(1) 7 C. B. (N.S.) 290.

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cases the law, under certain circumstances, regards the occasion as privileged, and exonerates the person who has made false defamatory statements from liability if he has made them in good faith. But if there be not that duty or interest which in law creates the privilege, then, though the person making the statements may have acted from the best of motives, and felt it his duty to make them, he is none the less liable. The gist of the action is that the statement was false and defamatory. Because in a strictly limited class of cases the law allows the defence that the statements were made in good faith, it seems to me, with all deference, illogical to affirm that malice constitutes one of the elements of the torts known to the law as libel and slander. But even if it could be established that in cases falling within certain well-defined categories, it is settled law that an evil motive renders actionable acts otherwise innocent, that is surely far from shewing that such a motive always makes actionable acts prejudicial to another which are otherwise lawful, or that it does so in cases like the present utterly dissimilar from those within the categories referred to.

The question raised by the decision under appeal is one of vast importance and wide-reaching consequences. In *Temperton* v. *Russell* (1) it was held that the principle of *Lumley* v. *Gye* (2), and *Bowen* v. *Hall* (3), was not confined to breaches of contract of service, but applied to breaches of any contract. The law laid down in *Bowen* v. *Hall* (3) in terms applies to all contracts, and I quite agree that the nature of the contract can make no difference.

If the judgment under appeal is to stand, and the fact that the act procured was unlawful as being a breach of contract be immaterial, it follows that every person who persuades another not to enter into any contract with a third person may be sued by that third person if the object were to benefit himself at the expense of such person. Such a case is within the very words employed in *Bowen* v. *Hall* (3) as applied in the present judgment. I do not think it possible to maintain such a proposition. It would obviously apply where one trader

(1) [1893] 1 Q. B. 715. (2) 2 E. & B. 216.
(3) 6 Q. B. D. 333.

induced another not to contract with a third person with whom he was in negotiation, but to make the contract with himself instead, a proceeding which occurs every day, and the legitimacy of which no one would question. Yet it is within the very language used in *Bowen* v. *Hall.* (1) He induces a person not to enter into a contract with a third person, and his object is to benefit himself at the expense of the person who would otherwise have obtained the contract, and thus necessarily to injure him by depriving him of it. It was said at the bar by the learned counsel for the respondents, in answer to this difficulty, that there was an exception in favour of trade competition. I know of no ground for saying that such an exercise of individual right is treated with exceptional favour by the law. I shall revert to this point presently in connection with another branch of the respondents' argument. But it is possible to give many illustrations to which no such answer would apply. I give one: a landowner persuades another to sell him a piece of land for which a neighbour is negotiating. It is so situated that it will improve the value of the property of whichever of them obtains it. His motive is to benefit himself at his neighbour's expense; he induces the owner of the land not to contract with his neighbour. The case is within the terms of the judgment in *Bowen* v. *Hall.* (1) Would it be possible to contend that an action lay in such a case? If the fact be that malice is the gist of the action for inducing or procuring an act to be done to the prejudice of another, and not that the act induced or procured is an unlawful one as being a breach of contract or otherwise, I can see no possible ground for confining the action to cases in which the thing induced is the not entering into a contract. It seems to me that it must equally lie in the case of every lawful act which one man induces another to do where his purpose is to injure his neighbour or to benefit himself at his expense. I cannot hold that such a proposition is tenable in principle, and no authority is to be found for it. I should be the last to suggest that the fact that there was no precedent was in all cases conclusive against the right to maintain an action. It is

(1) 6 Q. B. D. 333.

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the function of the Courts to apply established legal principles to the changing circumstances and conditions of human life. But the motive of injuring one's neighbour or of benefiting oneself at his expense is as old as human nature. It must for centuries have moved men in countless instances to persuade others to do or to refrain from doing particular acts. The fact that under such circumstances no authority for an action founded on these elements has been discovered does go far to shew that such an action cannot be maintained. I think these considerations (subject to a point which I will presently discuss) are sufficient to shew that the present action cannot be maintained.

It is said that the statement that the defendant would call the men out, if made, was a threat. It is this aspect of the case which has obviously greatly influenced some of the learned judges. Hawkins J. says that the defendant without excuse or justification "wilfully, unlawfully, unjustly, and tyrannically invaded the plaintiffs' right by intimidating and coercing their employers to deprive them of their present and future employment," and that the plaintiffs are therefore entitled to maintain this action. But "excuse or justification" is only needed where an act is primâ facie wrongful. Whether the defendant's act was so is the matter to be determined. To say that the defendant acted "unlawfully" is with all respect to beg the question, which is whether he did so or not. To describe his acts as unjust and tyrannical proves nothing, for these epithets may be and are, in popular language, constantly applied to acts which are within a man's rights, and unquestionably lawful. In my opinion these epithets do not advance us a step towards the answer to the question which has to be solved. The proposition is therefore reduced to this, that the appellant invaded the plaintiffs' right by intimidating and coercing their employers. In another passage in his opinion the learned judge says that there is no authority for the proposition that to render threats, menaces, intimidation or coercion available as elements in a cause of action, they must be of such a character as to create fear of personal violence. I quite agree with this. The threat of violence to property is equally a threat in the eye of the law.

And many other instances might be given. On the other hand it is undeniable that the terms "threat," "coercion," and even "intimidation," are often applied in popular language to utterances which are quite lawful and which give rise to no liability either civil or criminal. They mean no more than this, that the so-called threat puts pressure, and perhaps extreme pressure, on the person to whom it is addressed to take a particular course. Of this again numberless instances might be given. Even then if it can be said without abuse of language that the employers were "intimidated and coerced" by the appellant, even if this be in a certain sense true, it by no means follows that he committed a wrong or is under any legal liability for his act. Everything depends on the nature of the representation or statement by which the pressure was exercised. The law cannot regard the act differently because you choose to call it a threat or coercion instead of an intimation or warning.

I understood it to be admitted at the Bar, and it was indeed stated by one of the learned judges in the Court of Appeal, that it would have been perfectly lawful for all the ironworkers to leave their employment and not to accept a subsequent engagement to work in the company of the plaintiffs. At all events, I cannot doubt that this would have been so. I cannot doubt either that the appellant or the authorities of the union would equally have acted within his or their rights if he or they had "called the men out." They were members of the union. It was for them to determine whether they would become so or not, and whether they would follow or not follow the instructions of its authorities, though no doubt if they had refused to obey any instructions which under the rules of the union it was competent for the authorities to give they might have lost the benefits they derived from membership. It is not for your Lordships to express any opinion on the policy of trade unions, membership of which may undoubtedly influence the action of those who have joined them. They are now recognised by law; there are combinations of employers as well as of employed. The members of these unions, of whichever class they are composed, act in the interest of their class. If they resort to unlawful acts they may be indicted or sued. If they

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do not resort to unlawful acts they are entitled to further their interests in the manner which seems to them best, and most likely to be effectual.

If, then, the men had ceased to work for the company either of their own motion or because they were "called out," and the company in order to secure their return had thought it expedient no longer to employ the plaintiffs, they could certainly have maintained no action. Yet the damage to them would have been just the same. The employers would have been subjected to precisely the same "coercion" and "intimidation," save that it was by act and not by prospect of the act; they would have yielded in precisely the same way to the pressure put upon them, and been actuated by the same motive, and the aim of those who exercised the pressure would have been precisely the same. The only difference would have been the additional result that the company also might have suffered loss. I am quite unable to conceive how the plaintiffs can have a cause for action, because, instead of the ironworkers leaving, either of their own motion or because they were called out, there was an intimation beforehand that either the one or the other of these courses would be pursued. The ironworkers were employed on the terms that they might leave at the close of any day, and that on the other hand the employers might, if they saw fit, then discharge them. The company had employed the men knowing that they were members of the union, and they had on one occasion, at least, dealt with the appellant as its delegate. They had no ground for complaint if the men left, as they were by contract entitled to do, whether the men left of their own motion or followed the instruction of their union leaders. It is said that the company were in the power of the men because of the business loss to which the withdrawal of the men would subject them. But to what was this due, if not to the act of the company themselves in employing these men under a contract which either party might any day determine? Under such circumstances, to compare the act of the company to that of the traveller who, on a pistol being presented to his head, hands his purse to the highwayman, appears to me grotesque.

The object which the appellant and the ironworkers had in view was that they should be freed from the presence of men with whom they disliked working, or to prevent what they deemed an unfair interference with their rights by men who did not belong to their craft doing the work to which they had been trained. Whether we approve or disapprove of such attempted trade restrictions, it was entirely within the right of the ironworkers to take any steps, not unlawful, to prevent any of the work which they regarded as legitimately theirs being entrusted to other hands.

Some stress was laid in the Court below upon the fact that the plaintiffs were not at the time in question engaged upon ironwork, although immediately before that time they had been so employed elsewhere. This, it was said, shewed that the motive of the defendant and the ironworkers was the "punishment" of the plaintiffs for what they had previously done. I think the use of the word "punishment" has proved misleading. That word does not necessarily imply that vengeance is being wreaked for an act already done, though no doubt it is sometimes used in that sense. When a Court of justice, for example, awards punishment for a breach of the law the object is not vengeance. The purpose is to deter the person who has broken the law from a repetition of his act, and to deter other persons also from committing similar breaches of the law.

In the present case it was admitted that the defendant had no personal spite against the plaintiffs. His object was, at the utmost, to prevent them in the future from doing work which he thought was not within their province, but within that of the ironworkers. If he had acted in exactly the same manner as he did at a time when the plaintiffs were engaged upon ironwork, his motive would have been precisely the same as it was in the present case, and the result to the plaintiffs would have been in nowise different. I am unable to see, then, that there is any difference either in point of ethics or law between the two cases. The ironworkers were no more bound to work with those whose presence was disagreeable to them than the plaintiffs were bound to refuse to work because they found that

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this was the case. The object which the defendant, and those whom he represented, had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end. The act which caused the damage to the plaintiffs was that of the iron company in refusing to employ them. The company would not subordinate their own interests to the plaintiffs. It is conceded that they could take this course with impunity. Why, then, should the defendant be liable because he did not subordinate the interests of those he represented to the plaintiffs'? Self interest dictated alike the act of those who caused the damage, and the act which is found to have induced them to cause it.

I have been dealing so far with the ground upon which the judgment in the Court below proceeded. The learned counsel for the respondents, however, rested their arguments mainly upon a different ground, and it is this ground, and not that taken in the Court below, which has found most favour with the learned judges who think the plaintiffs entitled to judgment.

It was contended that the defendant by the course he took had interfered with the plaintiffs in their trade or calling, and that this of itself was an actionable wrong. In support of this very broad proposition reliance was mainly placed on the case of *Keeble* v. *Hickeringill*. (1) The declaration charged the defendant with firing a gun with design to damnify the plaintiff, and frighten the wild fowl from his decoy. In one report (2) it is stated that the plaintiff was lord of a manor, and had a decoy, and the plaintiff had also made a decoy upon his own ground, which was next adjoining the defendant's ground, and there the plaintiff had decoy and other ducks, of which he made profit. It was held that the action lay. In another report (3) this observation is attributed to Lord Holt: "Suppose defendant had shot in his own ground, if he had occasion to shoot it would have been one thing, but to shoot on purpose to damage the plaintiff is another thing, and a wrong." In another report (1) Lord Holt is reported as saying: "The action lies, for, first,

(1) 11 East, 574, n. (2) Holt, 14; 11 East, 573, n.
(3) 11 Mod. 74.

using or making a decoy is lawful; secondly, this employment of his ground for that use is profitable to the plaintiff, as is the skill and management of that employment." It is argued that this decision rests upon the principle that intentional interference with the trade of another is wrongful. If it was intended by the decision to draw a distinction between firing by the defendant on his own land when the decoy was kept by the plaintiff for purposes of trade profit, and doing the same act when the decoy was kept for purposes of pleasure only, I can see no ground for such a distinction. The defendant in firing upon his own land in such a way as to frighten the birds from the plaintiff's land, was either acting within his own rights or not. If he was not, he would surely be liable, whether the plaintiff was using his land for pleasure or profit. If he was within his rights he would not be liable in either case, and I do not see how his rights could depend on the circumstance that the plaintiff traded in ducks and did not merely use his decoy for purposes of sport, or that he sold them, and did not merely use them for consumption by his household. I cannot think that the right of action depended on the circumstance that the plaintiff traded in ducks, or that there would have been no right of action, all other circumstances being the same, if he had not done so. The case may be supported, and the observation of Lord Holt, which has been quoted, explained by the circumstance that if the defendant merely fired on his own land in the ordinary use of it, his neighbour could make no complaint, whilst, if he was not firing for any legitimate purpose, connected with the ordinary use of land, he might be held to commit a nuisance. In this view of it *Keeble* v. *Hickeringill* (1) has, of course, no bearing on the present case.

It is, however, treated in their opinions by the majority of the learned judges as establishing the wide and far-reaching proposition that every man has a right to pursue his trade or calling without molestation or obstruction, and that anyone who by any act, though it be not otherwise unlawful, molests or obstructs him is guilty of a wrong unless he can shew lawful justification or excuse for so doing.

(1) 11 East, 574, n.

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The case of *Keeble* v. *Hickeringill* (1) was decided about two centuries ago, but I cannot find that it has ever been treated, unless it be quite recently, as establishing the broad general proposition alleged. No such proposition is to be found stated, so far as I am aware, as the ground of any decision, or in any standard text-book of the English law. In Smith's Leading Cases, which were selected, and the notes on which were written by one of the most eminent lawyers of his day, the case of *Keeble* v. *Hickeringill* (1) is not even referred to. And the first editors of the work, after Mr. J. W. Smith's death, Willes and Keating JJ., lawyers on whose eminence it is unnecessary to dilate, equally passed it by without notice. If the view taken by the majority of the learned judges whose opinions were given at the bar be correct, *Keeble* v. *Hickeringill* (1) ought to have been itself treated as a leading case.

It has not, as I believe, been an authority on which subsequent decisions have been based, except in cases relating to the disturbance of decoys of wild birds. It is, nevertheless, suggested by the learned judges that it embodies the principle on which many subsequent cases have been decided, though it was not referred to, and the judges who pronounced the judgments were apparently unconscious of the authority they are said to have followed.

It is remarkable that amongst these cases are *Lumley* v. *Gye* (2) and *Bowen* v. *Hall* (3), which I have already discussed. They are said by several of the judges to rest on the principle established in *Keeble* v. *Hickeringill*. (1) Some of the judges, indeed, criticise adversely the grounds upon which these cases were decided, and intimate that they can only be supported on the ground taken by Lord Holt in *Keeble* v. *Hickeringill*. (1) That case, however, was not even cited by the counsel who argued *Lumley* v. *Gye* (2) or *Bowen* v. *Hall* (3), or by any of the judges who decided them. If it establishes the proposition contended for, it is astonishing that those very learned and distinguished judges were unaware of any such legal proposition, and instead of taking this short cut to their

(1) 11 East, 574, n. (2) 2 E. & B. 216.
(3) 6 Q. B. D. 333.

decision based it upon elaborate reasoning entirely unconnected with it.

Great reliance was placed by the respondents on certain dicta of Holt C.J. in *Keeble* v. *Hickeringill*. (1) That learned judge is reported to have said that if a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood, an action lies in all cases. And he gives the following illustrations: "If H. should lie in the way with guns and fright boys from going to school, and their parents would not let them go thither, that schoolmaster would have an action for loss of his scholars. A man hath a market to which he hath toll of horses sold, a man is bringing his horse to market to sell, a stranger hinders and obstructs him from going to the market, an action lies, because it imports damage. Again, an action on the case lies against one that by threats frightens away his tenants at will." In all these cases I think the Chief Justice was referring to acts in themselves wrongful. Firing guns in such a manner as to terrify persons lawfully passing along the highway would, I take it, be an offence. And the other illustrations given import, I think, that the obstruction and frightening were of such a character as to be unlawful, quite independently of the motives which led to them.

The case of *Carrington* v. *Taylor* (2) was also relied on by the respondents. It is, I believe, the only case which has been expressly based on *Keeble* v. *Hickeringill*. (1) The plaintiff there possessed an ancient decoy, and the defendant sought his livelihood by shooting wild fowl from a boat on the water, for which boat, with small arms, he had a license from the Admiralty for fishing and coasting along the shores of Essex. The decoy was near a salt creek where the tide ebbs and flows. The only proof of disturbance of the decoy by the defendant was that, being in his boat shooting wild fowl in a part of the open creek, he had fired his fowling-piece, first within a quarter of a mile of the decoy and afterwards within 200 yards of it, and had killed several widgeons. The judge left these facts to the jury as evidence of a wilful disturbance of the plaintiff's decoy by the defendant. The jury returned a verdict for 40*s*. damages,

(1) 11 East, 574, n. (2) 11 East, 571.

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and the Court, on the motion for a new trial, refused to disturb the verdict. They gave no reasons for their judgment. Unless a decoy possesses some peculiar privileges in the eye of the law, I confess myself quite unable to understand why the defendant was liable to an action or was not within his rights in shooting the wild fowl at the place he did for the purpose of gaining a livelihood, which is stated to have been his object. In any case, the decision affords no support to the contention now under consideration. For there was no allegation that the plaintiff traded in wild fowl; "great profits and advantages," in pleader's language, might well have accrued to him without his doing so. And there was no proof that he did so. Although some of the learned judges, who support the judgment below, rely on this case, one at least thinks it bad law. The case is important as shewing, as I think it clearly does, that the judges of the Court of King's Bench in 1809 did not regard the judgment in *Keeble* v. *Hickeringill* (1) as founded on interference with trade or dependent on the presence of malice.

I turn now to the other cases which are relied on by the learned judges in support of the proposition on which they found their conclusion in favour of the respondents, and which are said to have been decided upon the principle embodied in *Keeble* v. *Hickeringill*. (1) Amongst the earliest of these is *Garret* v. *Taylor*. (2) The declaration alleged that the plaintiff was a mason, and used to sell stones, and employed workmen in his stone pit. "Al queux"—I quote from the fuller statement of the pleading in 2 Rolle's Reports, p. 162—" le defendant tantas et frequentas minas de vita et de mutilatione membrorum suorum et bonorum devastatione per diversas sectas legis dedit" whereby the plaintiff's workmen left, and he was unable to obtain others. After judgment this declaration was held to disclose a cause of action. It is suggested that it is difficult to explain this decision except on the ground that the law recognises in every man a right to carry on his trade without disturbance. I am unable to see the difficulty or to think that the decision rests on any principle specially relating to trade.

(1) 11 East, 574, n. (2) Cro. Jac. 567.

If the plaintiff had not been a tradesman, but the owner of a house, and the same menaces had been uttered to those who came from time to time to visit him, I cannot but think that he would equally have had a cause of action. He would have been affected prejudicially in the occupation and enjoyment of his property by acts in themselves wrongful. Again, in *Tarleton* v. *M'Gawley* (1), a gun was fired at a canoe coming to the plaintiff's ship, whereby one of the natives in it was killed, and so natives were deterred by fright from approaching the ship for the purpose of trading. It is said that the essence of the wrong in this case was that the plaintiff was disturbed in his trade. I do not think so. Can it be doubted that if the shipowner had desired the presence of persons on board his ship for any other purpose, and the same wrongful act had deterred them from approaching the ship, the shipowner might have maintained a similar action to recover damages for any loss or inconvenience to which he had been put owing to the wrongful act of the defendant?

I will not trouble your Lordships by going through all the cases referred to. Speaking generally, I believe these actions would equally have been maintainable if a similar wrongful act had caused damage to, or had affected the legal rights of, a person wholly unconnected with trade. In all of them the act complained of was in its nature wrongful; violence, menaces of violence, false statements. In none of them was the proposition now contended for laid down or hinted at, and they can be supported without resort to any such principle. No doubt in some of the cases referred to the wrong was of such a nature that it is difficult to imagine circumstances in which precisely the same wrong could have caused damage to a person not in trade; but the act was not wrongful merely because it affected the man in his trade, though it was this circumstance which occasioned him loss. Among the authorities relied on were those relating to slander of a man in the way of his trade. This action again was traced to the principle that a man's trade must not be interfered with. It is true that slander of a man in the way of his trade is actionable without proof of special

(1) 1 Peake, N. P. C. 270.

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damage; but whatever the slander, the wrong is precisely the same, that defamatory words have been uttered. And slander of a man in the way of his office, if it be an office of profit or even of dignity, where it is one from which the holder may be removed, is actionable without proof of special damage in precisely the same way as slander of a man in the way of his trade.

I now proceed to consider on principle the proposition advanced by the respondents, the alleged authorities for which I have been discussing. I do not doubt that everyone has a right to pursue his trade or employment without "molestation" or "obstruction" if those terms are used to imply some act in itself wrongful. This is only a branch of a much wider proposition, namely, that everyone has a right to do any lawful act he pleases without molestation or obstruction. If it be intended to assert that an act not otherwise wrongful always becomes so if it interferes with another's trade or employment, and needs to be excused or justified, I say that such a proposition in my opinion has no solid foundation in reason to rest upon. A man's right not to work or not to pursue a particular trade or calling, or to determine when or where or with whom he will work is in law a right of precisely the same nature, and entitled to just the same protection as a man's right to trade or work. They are but examples of that wider right of which I have already spoken. That wider right embraces also the right of free speech. A man has a right to say what he pleases, to induce, to advise, to exhort, to command, provided he does not slander or deceive or commit any other of the wrongs known to the law of which speech may be the medium. Unless he is thus shewn to have abused his right, why is he to be called upon to excuse or justify himself because his words may interfere with some one else in his calling?

In the course of the argument one of your Lordships asked the learned counsel for the respondents whether, if a butler on account of a quarrel with the cook told his master that he would quit his service if the cook remained in it, and the master preferring to keep the butler terminated his contract with the cook, the latter could maintain an action against the butler.

One of the learned judges answers this question without hesitation in the affirmative. As in his opinion the present action would lie, I think he was logical in giving this answer. But why, I ask, was not the butler in the supposed case entitled to make his continuing in the employment conditional on the cook ceasing to be employed? And if so, why was he not entitled to state the terms on which alone he would remain, and thus give the employer his choice? Suppose after the quarrel each of the servants made the termination of the contract with the other a condition of remaining in the master's service, and he chose to retain one of them, would this choice of his give the one parted with a good cause of action against the other? In my opinion a man cannot be called upon to justify either act or word merely because it interferes with another's trade or calling; any more than he is bound to justify or excuse his act or word under any other circumstances, unless it be shewn to be in its nature wrongful, and thus to require justification.

The notion that there may be a difference in this respect between acts affecting trade or employment and other acts seems to be largely founded on certain dicta of Bowen L.J. in the case of the Mogul Steamship Company. It must be remembered that these were obiter dicta, for the decision was that the defendants were not liable. The passage perhaps chiefly relied upon is the following: "Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade is actionable if done without just cause or excuse. Such intentional action when done without just cause or excuse is what the law calls a malicious wrong." (1) It will be noted that the learned judge here makes no distinction between acts which interfere with property and those which interfere with trade. For the purpose then in hand the statement of the law may be accurate enough, but if it means that a man is bound in law to justify or excuse every wilful act which may damage another in his property or trade, then I say, with all respect, the proposition is far too wide; everything

(1) 23 Q. B. D. at p. 613.

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depends on the nature of the act, and whether it is wrongful or not.

Whatever may be the effect of the dicta of some of the judges in the case of *Mogul Steamship Co.* v. *McGregor* (1), I regard it as an authority supporting the appellant's case. Certain owners of ships formed an association with the object of securing to themselves exclusively a particular carrying trade. They allowed a rebate on the freights to all shippers who shipped only with members of the association. They also sent ships to ports where the plaintiffs were endeavouring to obtain cargoes, to carry at unremunerative rates, in order to secure the trade to themselves. A circular was sent by an agent of the defendants, reminding shippers at a particular port that shipments for London by any of the plaintiffs' steamers at any of the ports in China would exclude the firm making the shipment from participation in the returns of freight during the whole six-monthly period in which they had been made, even though the firm elsewhere might have given exclusive support to the steamers of the combination. It was held by this House that the plaintiffs had no cause of action. This, too, be it observed, though the action was in respect of a conspiracy, what was done being in pursuance of a common course of action concerted by several shipowners.

In that case the very object of the defendants was to induce shippers to contract with them, and not to contract with the plaintiffs, and thus to benefit themselves at the expense of the plaintiffs, and to injure them by preventing them from getting a share of the carrying trade. Its express object was to molest and interfere with the plaintiffs in the exercise of their trade. It was said that this was held lawful because the law sanctions acts which are done in furtherance of trade competition. I do not think the decision rests on so narrow a basis, but rather on this, that the acts by which the competition was pursued were all lawful acts, that they were acts not in themselves wrongful, but a mere exercise of the right to contract with whom, and when, and under what circumstances and upon what conditions they pleased. I am aware of no ground for saying that com-

(1) 23 Q. B. D. 598.

petition is regarded with special favour by the law; at all events, I see no reason why it should be so regarded. It may often press as hardly on individuals as the defendant's acts are alleged to have done in the present case. But if the alleged exception could be established, why is not the present case within it? What was the object of the defendant, and the workmen he represented, but to assist themselves in their competition with the shipwrights? A man is entitled to take steps to compete to the best advantage in the employment of his labour, and to shut out, if he can, what he regards as unfair competition, just as much as if he was carrying on the business of a shipowner. The inducement the appellant used to further his end was the prospect that the members of his union would not work in company with what they deemed unfair rivals in their calling. What is the difference between this case and that of a union of shipowners who induce merchants not to enter into contracts with the plaintiffs, by the prospect that if at any time they employ the plaintiffs' ships they will suffer the penalty of being made to pay higher charges than their neighbours at the time when the defendants' ships alone visit the ports? In my opinion there is no difference in principle between the two cases.

A further point to which I have not yet alluded was raised by the junior counsel for the respondents on the first argument at the bar. It was strenuously insisted upon by both learned counsel on the occasion of the second argument. It was said that the appellant had been guilty of misrepresentation, which had induced the company to take the course they did. No such point is to be found suggested in the pleadings; no such point was raised at the trial or in the Court of first instance, or until the junior counsel for the respondents addressed your Lordships. The jury were not asked whether there had been a misrepresentation, and have not found that this was the case. It is certainly not admitted by the appellant. Under these circumstances it would, in my opinion, be without justification and contrary to precedent for your Lordships to attach any weight to the point now. But I think it right to add that it does not seem to me to have been made good as a matter of

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fact. It is contended, as I understand, that the appellant represented that all the iron-workers in the union would leave if the plaintiffs continued to be employed, whereas some only had said that they would do so. I think the contention rests on a misapprehension. It is true that some only appear to have said that they would leave at once, but I think that this referred to an immediate departure without waiting till the end of the day, or at all events without awaiting the result of the interview between the appellant and the employers. The witness Elliot, whose evidence is relied on, himself says that "the chaps" were dissatisfied, and that there was only one way of settling it, and that was in accordance with the wishes of their men, these wishes being that the plaintiffs should not be continued upon work in the same ship. Even if a misrepresentation by the appellant to the Glengall Company would be sufficient in any circumstances to afford a right of action to the plaintiffs, I think it could scarcely be contended that it could do so, unless the misrepresentation were wilful and intentional. Of this there is, in my opinion, not a tittle of evidence. The appellant may well have believed from the statements made to him, that if the plaintiffs continued to work in the ship, all the ironworkers would cease to work. On the evidence I should come without hesitation to the conclusion that they would have done so.

For the reasons I have given I think the judgment should be reversed, and judgment entered in the action for the defendant with costs.

I have only very recently had the opportunity of knowing the views entertained by my noble and learned friend on the woolsack with regard to this case. In consequence of them, I think it right to add the following observations. I am not behind my noble and learned friend in the desire to preserve individual liberty. But I think it is never in greater danger than when a tribunal is urged to restrict liberty of action because the manner in which it has been exercised in a particular instance may be distasteful.

I am unable to regard as altogether accurate the statement of my noble and learned friend that up to the period when this

case reached your Lordships' House there was a unanimous consensus of opinion. I think he has overlooked the following facts. When the Court of Appeal in *Bowen* v. *Hall* (1) held that an action lay for maliciously inducing another to break his contract, the late Lord Chief Justice, differing from his two colleagues, was of opinion that even in such a case an action could not be maintained. When in *Temperton* v. *Russell* (2) Lord Esher and Lopes L.J. carried the doctrine further, and held that an action would lie for maliciously inducing another not to enter into a contract, A. L. Smith L.J., notwithstanding the strong expression of opinion by those learned judges, significantly reserved his own opinion on the point. And when in the present case Lord Esher and Lopes L.J. re-affirmed the opinions they had previously pronounced, Rigby L.J. only concurred in the judgment under appeal in deference to the opinions expressed in the previous case.

In my opinion the conclusion at which I have arrived is not in conflict with any decision or even with the pronounced opinions of any judges except those enunciated in the recent cases now under review. On the contrary, I believe with all deference to my noble and learned friend on the woolsack that any other conclusion would run counter to principles of the common law which have been long well established.

I regret to have trespassed so long on your Lordships' time. My excuse must be that I regard the decision under appeal as one absolutely novel, and which can only be supported by affirming propositions far-reaching in their consequences and in my opinion dangerous and unsound.

LORD MACNAGHTEN. My Lords, I am sorry to say that I must begin by recapitulating the facts of the case. For the findings of the jury, taken by themselves, do not convey to my mind any definite meaning. The jury have found that the appellant Allen "maliciously induced" the Glengall Iron Company to discharge the respondents from their service, and they have awarded damages in consequence. I do not know what the jury meant by the word "induced"; I am not sure that I

(1) 6 Q. B. D. 333. (2) [1893] 1 Q. B. 715.

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know what they meant by the word "maliciously." Sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself. I am therefore compelled to turn for help to the evidence at the trial, accepting, as I suppose the jury must have accepted, the account given by the respondents in preference to that offered by the appellant wherever there may be any shadow of difference between them.

There is a dry dock at Millwall called the Regent's Dock. It belongs to the Glengall Iron Company, Limited, and is used by them for repairing ships. In the beginning of April, 1894, a ship named the *Sam Weller* was lying there and under repair. There were at work at the time on this ship some twenty shipwrights and a much larger number of boiler-makers, or iron-men, as they are called. On the evening of April 11 the job was about half finished. So far there had been no difficulty with the men. Shipwrights and iron-men were working together and apparently on good terms.

Shipwrights in the port of London are apprenticed and trained to work in iron as well as in wood. And there, though I believe not elsewhere, shipwrights in some yards are put to do ironwork. Boiler-makers, or iron-men, on the other hand, are taught to work in iron or on iron ships only. They have no skill in woodwork. The London shipwrights have a trade union called the Shipwrights' Provident Union. The iron-men too have a trade union—a union larger and more powerful than that of the shipwrights, and not confined to the port of London. It is generally known as the Boiler-makers' Union. The head-quarters of the society are at Newcastle-on-Tyne. The executive council meets there; but there are district delegates and district committees in different parts of the country.

For some time past there has been a good deal of jealousy between the two unions. Reasonably or unreasonably, the iron-men hold that the only proper business of shipwrights is to work in wood, and that any shipwright who presumes to work in iron is trespassing on their domain. Such a man, it seems, has "no principle whatever"—at least, that appears to be the view expressed by an intelligent boiler-maker who has attained the position of district delegate for London.

On the morning of April 12 the respondents Flood and Taylor, two shipwrights who had served their time with the Glengall Iron Company, and were members of the Shipwrights' Union, were taken on to work upon the *Sam Weller*. They were set to do woodwork with the other shipwrights on the job. The Glengall Company employ about three times as many iron-men as shipwrights, and they make it a rule never to put shipwrights on iron work. But unfortunately Flood and Taylor had come straight from a yard close by belonging to Messrs. Mills & Knight, where, owing to a dispute which occurred some few years ago about this very question, shipwrights only are now employed, and do both iron and woodwork. Flood and Taylor had been in this yard about four months taking the bottom out of a big iron ship. Their presence there had been observed, and it was known what they were doing. They were excellent workmen, skilful, steady, and well-behaved. But in the eyes of the iron-men they had committed an unpardonable offence.

As soon as they came into the Regent's Dock and the story of their late employment got about there was a ferment among the iron-men. In their leisure moments, at breakfast-time, and again in the dinner-hour, they collected in groups and clusters, talking among themselves and eyeing the new-comers "with a stern glance," as though they meant mischief. "I could see they meant harm," says Flood in his evidence-in-chief, and Taylor confirms what Flood says.

In the afternoon, one of the iron-men, called Elliott, who seems to have been the first or among the first to recognise Flood and Taylor, and to have taken a leading part in "the agitation," as it was called, telegraphed to the appellant, Allen, who was the London delegate of the boiler-makers' union. Allen came to the Regent's Dock the next morning and saw Elliott for a few minutes, just as the men were going back to work after breakfast. Elliott told him what the trouble was about, and said that the men were talking of throwing down their tools at dinner-time. Allen warned Elliott that the men must be careful; they were not to leave their work: if they took the law into their own hands, and left without the sanction

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of the union, he would use his influence to have them deprived of the benefits of their society, and fined besides; they must stay on until the matter was settled. Then Allen saw Edmonds, the foreman of the shipwrights, who rather resented Allen's interference in the matter.

In the meantime Mr. Halkett, the managing director of the company, had been sent for. He knew Allen as the London delegate of the boiler-makers' union, and had settled some former difficulties with him. He came down to the dock, and had an interview with Allen in the board-room. Edmonds was called in. There is very little conflict as to what passed at this interview. At any rate, the account given by Mr. Halkett, who was called as a witness by Flood and Taylor, may be accepted as accurate. Allen shewed Mr. Halkett Elliott's telegram, and said that the men belonging to his union felt aggrieved at having to work with Flood and Taylor; the ill-feeling was serious; if Flood and Taylor were continued on the job, the iron-men would leave off work or be called out. Mr. Halkett could not say which expression was used. He thought they came to the same thing, and I must say I think so too. Mr. Halkett said it was very hard on his company. Then Edmonds seems to have taken up the cudgels for the two shipwrights, and words passed between him and Allen. Allen thinks Edmonds was excited. Edmonds complains that Allen was arbitrary. Why, he asked, were Mills & Knight's sins to be visited on them? Allen replied that there was no ill-feeling towards the Glengall Company or towards Flood and Taylor personally; but their men were determined to put an end to the practice of shipwrights encroaching on their trade: it was so difficult to trace the offenders; where the men were known, the same thing would occur, in every yard on the Thames. Mr. Halkett seems to have taken the matter very quietly all through. He was only concerned for his employers. It would not do, he said, to have the work stopped just for the sake of two men. So he told Edmonds that Flood and Taylor were to be discharged, and not employed again until the affair was settled. In the meantime, orders were given not to engage shipwrights who were known to have been working on iron

elsewhere, "for the sake," as Mr. Halkett put it, "of peace and quietness for ourselves." That evening Flood and Taylor were discharged, and they were out of work for a few days.

In dismissing Flood and Taylor as he did, Mr. Halkett did not break any contract with them. They were engaged on piece-work, and liable to be discharged at the end of any day, though in ordinary course a man engaged on such a job would be kept on until the job was finished, or until the work slackened so that his services were no longer required.

On their dismissal, Flood and Taylor brought this action against Allen. Each party had the financial support of their union. The plaintiffs joined as co-defendants Jackson and Knight, the chairman and secretary of the boiler-makers' union. Jackson and Knight had no more to do with the matter than any of your Lordships. The jury found that they did not authorize Allen in acting as he did. On further consideration, the action was dismissed against them, and the dismissal was affirmed on appeal. It is not necessary for me to say anything about this part of the case, except that I cannot help thinking that the fact of the judge leaving any question to the jury as regards the chairman and secretary of the union must have rather tended to confuse the issue as between the plaintiffs and Allen. Although the learned judge pointed out that there was no evidence of conspiracy, it must, I should think, have given some colour to the suggestion of oppressive combination as an element to be considered—whereas in the course of the trial the case was in fact, as it seems to me, reduced to a claim against Allen for what he did in his individual capacity.

Now before I proceed to consider the legal grounds on which Kennedy J. and the Court of Appeal decided the case against Allen, I should like to ask what there was wrong in Allen's conduct. He had nothing to do with the origin of the ill-feeling against Flood and Taylor. He did nothing to increase it. He went to the dock simply because he was sent for by one of the men of his union. It seems to be considered the duty of a district delegate to listen to the grievances of the members of his union within his district, and to settle the difficulty if possible. The jury found that the settlement of this dispute

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was a matter within Allen's discretion. The only way in which he could settle it was by going and seeing the manager. There was surely nothing wrong in that. There was nothing wrong in his telling the manager that the iron-men would leave their work unless the two shipwrights against whom they had a grudge were dismissed, if he really believed that that was what his men intended to do. As far as their employers were concerned the iron-men were perfectly free to leave their work for any reason, or for no reason, or even for a bad reason; any one of them might have gone singly to the manager, or they might have gone to him all together (if they went quietly and peaceably), and told him that they would not stay any longer with Flood and Taylor at work among them.

If so, it is difficult to see why fault should be found with Allen for going in their place and on their behalf and saying what they would have said themselves. Then, did Allen say or do anything in the course of his interview with Mr. Halkett which, in the events which have happened, gives Flood and Taylor a right of action against him? That brings me to the case presented to the jury.

In the statement of claim there were serious allegations for which, as it turned out, there was no foundation whatever in fact. It was alleged that Allen and his co-defendants had induced the company to break contracts with the plaintiffs. That was a mistake: there was no contract to break. It was alleged that Allen and his co-defendants had conspired against the plaintiffs. That was a mistake too; there was not, as the learned judge said, "a shred of evidence of any conspiracy at all." Then there was a charge of intimidation and coercion. That charge vanished too. The only reference the learned judge made to it was to say: "There is no evidence here, of course, of anything amounting to intimidation or coercion in any legal sense of the term." The case as launched broke down.

The learned judge, however, saved two questions from the wreck and put them to the jury. They were these: 1. Did Allen maliciously induce the company to discharge the plaintiffs? 2. Did Allen maliciously induce the company not to engage the

plaintiffs? In putting these questions the learned judge explained that the word "maliciously" was a term of art in law —a proposition, at any rate, not universally true. "It means," he said, "connected with the word 'induce' this—that it was not for the mere purpose of forwarding fairly Allen's own interests, but from the indirect motive of doing a mischief to the plaintiffs in their lawful business." That comes near the ordinary meaning of "malice" if "deliberate mischief" be taken as its ordinary meaning. And it is to be observed that in the cases professedly founded on *Lumley* v. *Gye* (1), I refer particularly to *Bowen* v. *Hall* (2), *Temperton* v. *Russell* (3), and the present case in the Court of Appeal, the word "malice" seems to be used in a sense not far removed from its ordinary and popular signification.

As regards the meaning of the word "induce," I do not think the jury got much assistance. I rather gather from the summing-up that the jury were given to understand that if they thought that Allen merely represented the state of things as it was—and the feeling of the iron-men at the Regent's Dock—they would be at liberty to answer the questions put to them about Allen in the negative. But the answer must be the other way if they thought that Allen went further, and assumed to represent the union, and to speak as if he had the power of the union at his back; that would be a threat and would amount to "inducing." Now, I must say that I do not think it can be said that Allen did "induce" the company to discharge the plaintiffs. Certainly it cannot be truly said that he procured them to be discharged. It was not his act that prevented the company from continuing to employ them. If the whole story had been a fiction and an invention on his part I could have understood the finding of the jury. But I do not think there was any misrepresentation on Allen's part. I do not think there was any exaggeration. Nor, indeed, was any such point made at the trial. The evidence of the plaintiffs themselves proves that the iron-men were in a very nasty temper. They believed the iron-men meant mischief. Allen

(1) 2 E. & B. 216. (2) 6 Q. B. D. 333.
(3) [1893] 1 Q. B. 715.

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evidently thought they were bent on striking, for he spent the whole of the time he was talking to Elliott in warnings against that step. I should infer that Edmonds, the foreman, thought the position very critical, for in the evening, some time after the interview between Allen and Mr. Halkett, when Flood and Taylor were discharged, he told them to go back and take their tools out and let the iron-men see them, thus giving the iron-men a sort of triumph which I should think was the last thing he would have done if he could have helped it. Edmonds, indeed, says he thought Allen "had only just to hold up his hand and the whole of the men would go off." But he gathered this from Allen's manner, not from what he said. When he was asked about what Allen said, he answered very fairly: "Did not he tell you this?" he was asked, "that from what he knew of the feeling of your men he believed if those two men continued the boiler-makers would leave?" Answer: "Yes." Question: "Are those pretty nearly the words he used?" Answer: "As near as I can tell."

But, after all, whatever Edmonds may have gathered from Allen's manner, it was not Edmonds who discharged the plaintiffs. It was Mr. Halkett, and he did it without consulting Edmonds. Mr. Halkett says nothing to shew that he was afraid of Allen. He must have known too much about trade unions to have supposed for a moment that a subordinate officer in Allen's position could have taken upon himself to call the men out. It is quite plain what it was that induced Mr. Halkett to discharge the plaintiffs. It was nothing that originated with Allen. It was no misrepresentation on his part. It was not fear of his personal influence. It was simply a very natural desire for peace and quiet. Mr. Halkett did not want the yard upset. He did not want a row between two sets of workmen which was pretty sure to end in a strike.

So we see now, I think, what the findings of the jury come to if they are to be treated as being in accordance with the evidence. They must mean that Allen induced the company to discharge the plaintiffs, by representing to the manager, not otherwise than in accordance with the truth, the state of feeling in the yard, and the intentions of the workmen, and that he

did so "maliciously," because he must have known what the issue of his communication to the manager would be, and naturally perhaps he was not sorry to see an example made of persons obnoxious to his union. But is his conduct actionable? It would be very singular if it were. No action would lie against the company for discharging the two shipwrights. No action would lie against the iron-men for striking against them. No action would lie against the officers of the union for sanctioning such a strike. But if the respondents are right the person to answer in damages is the man who happened to be the medium of communication between the iron-men and the company—the most innocent of the three parties concerned, for he neither set the "agitation" on foot, nor did he do anything to increase it, nor was his the order that put an end to the connection between employer and employed. It seems to me that the result would have been just the same if Edmonds had told Mr. Halkett what was going on in the yard, or if Mr. Halkett had learned it from Flood and Taylor themselves.

Even if I am wrong in my view of the evidence and the verdict, if the verdict amounts to a finding that Allen's conduct was malicious in every sense of the word, and that he procured the dismissal of Flood and Taylor, that is, that it was his act and conduct alone which caused their dismissal, and if such a verdict were warranted by the evidence, I should still be of opinion that judgment was wrongly entered for the respondents. I do not think that there is any foundation in good sense or in authority for the proposition that a person who suffers loss by reason of another doing or not doing some act which that other is entitled to do or to abstain from doing at his own will and pleasure, whatever his real motive may be, has a remedy against a third person who, by persuasion or some other means not in itself unlawful, has brought about the act or omission from which the loss comes, even though it could be proved that such person was actuated by malice towards the plaintiff, and that his conduct if it could be inquired into was without justification or excuse.

The case may be different where the act itself to which the loss is traceable involves some breach of contract or some

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breach of duty, and amounts to an interference with legal rights. There the immediate agent is liable, and it may well be that the person in the background who pulls the strings is liable too, though it is not necessary in the present case to express any opinion on that point.

But if the immediate agent cannot be made liable, though he knows what he is about and what the consequences of his action will be, it is difficult to see on what principle a person less directly connected with the affair can be made responsible unless malice has the effect of converting an act not in itself illegal or improper into an actionable wrong. But if that is the effect of malice, why is the immediate agent to escape? Above all, why is he to escape when there is no one else to blame and no one else answerable? And yet many cases may be put of harm done out of malice without any remedy being available at law. Suppose a man takes a transfer of a debt with which he has no concern for the purpose of ruining the debtor, and then makes him bankrupt out of spite, and so intentionally causes him to lose some benefit under a will or settlement—suppose a man declines to give a servant a character because he is offended with the servant for leaving —suppose a person of position takes away his custom from a country tradesman in a small village merely to injure him on account of some fancied grievance not connected with their dealings in the way of buying and selling—no one, I think, would suggest that there could be any remedy at law in any of those cases. But suppose a customer, not content with taking away his own custom, says something not slanderous or otherwise actionable or even improper in itself to induce a friend of his not to employ the tradesman any more. Neither the one nor the other is liable for taking away his own custom. Is it possible that the one can be made liable for inducing the other not to employ the person against whom he has a grudge? If so, a fashionable dressmaker might now and then, I fancy, be plaintiff in a very interesting suit. The truth is that questions of this sort belong to the province of morals rather than to the province of law. Against spite and malice the best safeguards are to be found in self-interest and public opinion. Much

more harm than good would be done by encouraging or permitting inquiries into motives when the immediate act alleged to have caused the loss for which redress is sought is in itself innocent or neutral in character, and one which anybody may do or leave undone without fear of legal consequences. Such an inquisition would, I think, be intolerable, to say nothing of the probability of injustice being done by juries in a class of cases in which there would be ample room for speculation and wide scope for prejudice.

In order to prevent any possible misconstruction of the language I have used I should like to add that in my opinion the decision of this case can have no bearing on any case which involves the element of oppressive combination. The vice of that form of terrorism commonly known by the name of "boycotting," and other forms of oppressive combination, seems to me to depend on considerations which are, I think, in the present case conspicuously absent.

As regards authority, there is, I think, very little to be said. It is hardly necessary to go further back than *Lumley* v. *Gye* (1) in 1853. There is not much help to be found in the earlier cases that were cited at the bar, not even, I think, in the great case about frightening ducks in a decoy, whatever the true explanation of that decision may be. In *Lumley* v. *Gye* (1) it was held that an action would lie for procuring a person to break a contract for personal service. The subsequent cases of *Bowen* v. *Hall* (2) and *Temperton* v. *Russell* (3) are authorities for the proposition that the principle is not confined to contracts for personal service. There is no doubt much to be said for that proposition. But the judgment under appeal does not depend on *Lumley* v. *Gye* (1) or on any decision before or after that case. It rests only on certain dicta to be found first in *Bowen* v. *Hall* (2), and afterwards repeated in *Temperton* v. *Russell*. (3) Those dicta are of great weight, owing to the eminence of the judge by whom they were pronounced, but they certainly were not necessary for the decision in either case. *Lumley* v. *Gye* (1) was heard on demurrer. The counts

(1) 2 E. & B. 216. (2) 6 Q. B. D. 333.
(3) [1893] 1 Q. B. 715.

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which were demurred to alleged that the defendant knew "the premises," that is, the existence of the contract stated in the declaration, and was "maliciously intending to injure the plaintiff." Mr. Willes, for the defendant, in reply, pointing out that malice was never averred in actions for seducing servants, argued that "the averment of malice can make no difference"; and that seems to have been the opinion of the majority of the Court, who thought the action would lie. Crompton J. treats the allegation of malice as meaning nothing more than the allegation of notice, and Erle J. indicates that the principle on which the action is to be rested is that "the procurement of the violation of the right"—that is, the plaintiff's right under the contract—"is a cause of action." If so, it would seem to follow that, provided the violation is committed knowingly, it cannot matter whether the thing is done maliciously or not. And, therefore, with all deference to the opinion of Blackburn J., who, if I rightly understand his words in *Cattle* v. *Stockton Waterworks* (1), seems to say that "malicious intention" was the gist of the action, I should be disposed to hold that if a right has been knowingly violated an allegation of malice is superfluous, and that if there has been no violation of any right, malice by itself is not a cause of action. I cannot, therefore, agree with the late Master of the Rolls in thinking that the act complained of was "wrongful" because it was "malicious," and that if there be a malicious act, and loss resulting from that act, it does not matter whether there has been a violation of right or not.

I am of opinion that judgment should be entered for the appellant.

LORD MORRIS. My Lords, if this was an ordinary case I should be satisfied by merely expressing my concurrence in the able and exhaustive judgment of the Lord Chancellor, which deals so fully both with the law and the facts of the case; but as the judgment of this House about to be pronounced overturns, as I consider, the overwhelming judicial opinion of England, I feel bound to state shortly my views without reiterating

(1) (1875) L. R. 10 Q. B. 458.

the common facts of the case or going into the evidence in detail, as both have already been so often repeated.

The first question that would arise is: Was there not a de facto contractual relation between the Glengall Iron Company, the employers, and the plaintiffs, the employees, which would have continued but for the malicious interference of the defendant? The plaintiffs were only day-labourers, but with a certainty of their employment being continued de die in diem for a considerable time. In my opinion it is actionable to disturb a man in his business by procuring the determination of a contract at will, or by even preventing the formation of a contract, when the motive is malicious and damage ensues.

The question of actual contractual relations in this case was not dealt with, as during the course of the trial it was assumed that there was no contractual relation existing between the Glengall Iron Company and the plaintiffs which was determined by the action of the defendant. I desire, however, to deal with the case on the finding of the jury, namely, "That the defendant did maliciously induce the Glengall Iron Company to discharge the plaintiffs from their employment."

At common law a workman had a *right* to work with any person who was willing to employ him. Both had a right to trade in labour as in any other commodity and as they thought fit. This was part of the personal liberty enjoyed by every man, and, like personal liberty, was the subject of peculiar safeguards, notably—it was a right which like that of personal liberty could not be bartered away. A contract restraining one's right to trade, with certain exceptions not material here, was, like a contract to become a slave, null and void. One right as well as the other was inalienable.

The existence of this right to trade was established at least as far back as the reign of Queen Anne. In *Keeble* v. *Hickeringill* (of which there is a note in 11 East, p. 574) it was held that an action on the case lay for discharging guns near the decoy pond of another with a design to damnify the owner by frightening away the wild fowl resorting thereto, by which the wild fowl were frightened away and the owner damnified. It is to be observed that the act of discharging the gun was per se

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lawful. The ground of Holt C.J.'s judgment was as follows: "Then when a man useth his art or skill to take them, to sell or dispose of for his profit, this is his trade, and he that hinders another in his trade or livelihood is liable to an action for so hindering him." Then later on he says: "Now there are two sorts of acts for doing damage to a man's employment for which an action lies. The one is in respect of a man's privilege or in respect of his property. The other is where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood. There an action lies in all cases; but if a man doth him damage by using the same employment, as if Mr. Hickeringill had set up another decoy on his own ground near the plaintiff's and that had spoiled the custom of the plaintiff no action could lie." Why? "Because he had as much liberty to make and use a decoy as the plaintiff."

These words, in my opinion, draw the distinction between an act in se legal which is rendered unlawful when done maliciously and the same act which remains lawful, although it does harm to another, because it was done in the exercise of the owner's right to trade, and that harm resulted from trade competition.

Erle C.J. in his work upon Trade Unions at p. 12 lays down the proposition thus: "Every person has a right under the law as between him and his fellow subjects to full freedom in disposing of his own labour or his own capital according to his own will." So far as to the existence of the right. What are its limits? Or, in other words, what will amount to an infringement of it? This also is clearly stated by Erle C.J.: "It follows that every other person is subject to the correlative duty arising therefrom and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition *by a*

single person is a wrong to be remedied by action or indictment as the case may be."

To what extent have these opinions and the judgment in *Keeble* v. *Hickeringill* (1) been dissented from or approved of in subsequent judicial proceedings? I am not aware of any judicial expression of dissent from them, whilst the judgments of several of the judges in the *Mogul Case* (2), in the Appeal Court and in this House, largely support them. In the admirably logical and scientific judgment of Bowen L.J. he says (3): "The plaintiffs had a right to be protected against certain kinds of conduct, and we have to consider what conduct would pass this legal line or boundary. Now intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or *trade* is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." Again he says (4): "Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it." Amongst several cases he cites is that of *Keeble* v. *Hickeringill*. (1) He proceeds to decide in favour of the defendants upon the ground that there was a just cause or excuse for them. He adds (5): "Such legal justification would not exist when the act was merely done with the intention of causing temporal harm without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances and to discover on which side of the line each case fell."

In this House in the judgment of Lord Bramwell, which was read in his absence by Lord Macnaghten, who expressed his agreement, it is stated: "The plaintiffs do not complain of any act the ultimate object of which was to injure the plaintiffs, having its origin in malice or ill-will to them,"

(1) 11 East, 574, n.
(2) 23 Q. B. D. 598; [1892] A. C. 25.
(3) 23 Q. B. D. 613.
(4) 23 Q. B. D. 614.
(5) 23 Q. B. D. 618.

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and he refers generally, without giving its name, to *Keeble* v. *Hickeringill*. (1)

Lord Field, in his judgment, says: "I think that this appeal may be decided upon the principles laid down by Holt C.J. in *Keeble* v. *Hickeringill*." (1) After pointing out that "acts done by a trader in the lawful way of his business, although by the necessary results of effective competition interfering injuriously with the trade of another, are not the subject of any action," he proceeds thus: "Of course it is otherwise, as pointed out by Holt C.J., if the acts complained of, although done in the way or under the guise of competition or other lawful right, are in themselves violent or purely malicious, or have for their ultimate object injury to another from ill-will to him and not the pursuit of lawful rights."

In this House opinions were expressed by seven of their Lordships. Not one expressed any disapproval or adverse criticism of the case of *Keeble* v. *Hickeringill*. (1)

My Lords, if the principle of *Keeble* v. *Hickeringill* (1) is applicable to this case, as in my opinion it is, I fail to see how Kennedy J. could have withdrawn the case from the jury. In his charge he put Allen's case, as it seems to me, most favourably to the jury. He says (I merely summarise it): "Now bearing in mind how Allen came, you have to consider whether the plaintiffs have proved to you not merely that he represented to the employers what the men working in that yard would be likely to do unless they could come to some settlement, and left to the employers . . . . the choice of action—and I do not think in that case you would say that was an inducement . . . . that he felt himself in this position: I am a district delegate; in the interest alike of the doing of the employers' work as well as of the men, it is better that I should go and tell the employers what the facts are after telling the men that they are to take no hurried action—to let the matter either be settled peaceably by the employers, or if it cannot be settled by them be brought in due course before the executive of the union."

The charge of the learned judge seems to me to put the case

(1) 11 East, 574, n.

favourably for Allen; but it appears to me that some of your Lordships have put yourselves in the place of the jury by coming to the conclusion that Allen had gone to the employers merely to intimate, as has been said, or represent to them the feelings and views of the men—to be their messenger or mouthpiece—that being the very case that was negatived by the jury. Indeed, my noble and learned friend Lord James in his judgment, which I have had the advantage of reading, has gone further, for he says: "For him (Allen) to communicate such intention to the company did not injure the respondents." If this was correct, there was no necessity to go any further. The plaintiffs would not have suffered damage by the act of the defendant. In my opinion it was for the jury, the constituted tribunal in such cases, and not for your Lordships, to say whether Allen went to the employers as peacemaker, intimator, representer, messenger, or mouthpiece, as was stated by him, or rather for him by some of your Lordships, or whether he went with the object and for the purpose of having the plaintiffs punished for past alleged offences by getting them discharged at once from their employment.

The defendant gave a complete denial to the substance of Mr. Halkett's evidence. The defendant did not take in his evidence the position which is now taken up for him by some of your Lordships of being a messenger or an intimator of what had occurred. He was conscious he had done wrong, and accordingly, to try to save himself, he denied altogether what Mr. Halkett had proved. The jury disbelieved him. His untruthful evidence gave colour to his conduct and action which, in my opinion, amounted to this. He was an outsider, though he was telegraphed for by Elliott. He proceeded to threaten the employers with the withdrawal of the boilermakers which would be most injurious to the employers, unless the plaintiffs were dismissed at once. His object was to injure the plaintiffs and to punish them, and he had the intention of further persecuting them by not allowing them to work anywhere, which was not the wish of the men or their union. His conduct was unauthorized, and he misrepresented to the employers both the wishes of the men and their objects, and

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acted outside the scope of his authority as a district delegate of the union.

I therefore conclude by adopting as my own the last paragraph of Hawkins J.'s opinion on the question propounded to the judges by your Lordships: "Being satisfied that the right of the plaintiffs is established by law, I think there is an abundance of evidence fit to be left to the jury that without excuse or justification, and not in the exercise of any privilege or in defence of any right either of his own or of the boiler-makers, the defendant wilfully, unlawfully, unjustly, and tyrannically invaded and violated the plaintiffs' right by intimidating and coercing their employers to deprive them of their present and future employment."

I am therefore of opinion that the considered judgment of Kennedy J., which was unanimously affirmed by the Court of Appeal, should be affirmed by this House.

LORD SHAND. My Lords, I am of opinion that the judgment complained of should be reversed, and judgment entered for the defendant with costs.

Certain facts have, with reference to the evidence and the verdict of the jury, been clearly established. In the first place, it is clear that the plaintiffs had no contract with their employers, the Glengall Iron Company, entitling them to continuous employment. They were engaged to work by the day, entitled to leave the employment at the end of each day, and, on the other hand, subject to the risk that their employers might at any time cease to employ them further. While this was so, it is however to be observed that it is matter of clear inference, and indeed of some direct evidence, that the employment would have gone on for some time longer than it did if the employers had not been induced to discontinue it.

It is, in my opinion, further clear that the employment was discontinued by the employers, the Glengall Iron Company, because of the representations made to them by the defendant Allen. This has, I think, been proved, and indeed has been expressly affirmed by the verdict of the jury.

There is no real controversy as to the statement or represen-

tation made by the defendant which induced the employers to dispense with the plaintiffs' services. The defendant, in effect, stated that if the plaintiffs were continued as workers, even at woodwork only, on the vessel then in the course of being repaired, the boiler-makers then engaged at the ironwork on the ship would cease work, and so put a stop to the completion of the repairs.

There has been considerable criticism by some of the learned consulted judges of the statement on this subject made by the defendant Allen in his character of representative of the boiler-makers. It has been said, and it was indeed maintained in the argument, that the defendant exaggerated the state of matters in the shipbuilding yard in regard to the boiler-makers, that he gave too highly coloured an account of the feelings of discontent of the boiler-makers towards the plaintiffs, whom they considered to be improperly intruding into a department of work which they regarded as theirs exclusively, at least so far as shipwrights were concerned. I confess I attach no importance to any such considerations, and this for two reasons. I find no evidence of exaggeration or misrepresentation on the part of the defendant; but, further, no such point was taken, or presented by the learned judge to the jury for their consideration and verdict. It seems impossible from a perusal of the evidence to come to any other conclusion than this—that the boiler-makers had made up their minds they would not continue to work on the same vessel with the plaintiffs. That the boiler-makers had made up their minds as to the course they would pursue is clear from their meetings and demeanour before they sent for the defendant to come to the yard, and from the fact that they did send for him and required him to make the communication he did to the employers. I think the evidence proves that in these communications he made no false representation, but simply informed the employers of the true state of matters. But it is enough that no such point was put before the jury. Had the plaintiffs' counsel meant to maintain that the defendant had used improper means, in the sense of making false representations as to the attitude of the boiler-makers or the resolution they had come to, they were bound to

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put this distinctly in issue. Evidence would have been specially directed to the subject, and a special question would have been put to the jury. Not having done so, the question cannot, in my opinion, be now raised.

Up to this point, then, the case stands thus—that the plaintiffs lost the prospect, it might even be fairly said the certainty, of continued employment in consequence of representations made by the defendant Allen as to the resolution of the boilermakers, but that these representations were true in fact. The plaintiffs have proved the issue that the defendant by his representations induced their employers to discontinue the employment; but this must be taken with the qualification that he did so by no improper means, by which I mean that he used neither fraud nor violence, but merely stated to the employers the true state of matters in the building yard. Nevertheless, the jury have found that the defendant maliciously induced the employers to discontinue their employment of the plaintiffs.

This leads to the notice of the only other matter of fact which must be kept in view in the determination of the question of law to be decided. The fact is that the defendant was not actuated by malice towards the plaintiffs, in anything he said or did, in his communications with the employers, taking that word in its popular and ordinary sense, as meaning personal ill-will. He did not even know the plaintiffs. He came on the scene only because he was sent for by the boilermakers, and he acted only officially as their delegate and representative. All this is perfectly clear, but in addition the following passage in the charge of the learned judge shews that the verdict cannot be taken as a finding of personal malice. "The word 'malice' is a word of art in law . . . . . and it does not mean, you may take it from me, in this case a personal dislike—a personal feeling of resentment against the two plaintiffs. It is clear from the evidence of the men and of their employers that there was no such personal feeling in this case."

The jury has, however, found expressly by their verdict that the defendant did "maliciously induce the Glengall Iron Company not to engage the plaintiffs," and under the direction of the learned judge assessed damages, for which his Lordship

granted a decree. With the utmost deference to the opinions of those who think otherwise, I am unable, as I have been from the beginning of the argument, to find any ground in law (and the question is one entirely of law) on which this verdict can be justified. The explanation of the verdict is to be found in the following passage in the charge of the learned judge, which immediately succeeds what I have already quoted: "You will take it from me that here 'maliciously' means with the intention of doing an injury to the plaintiffs in their business, with the intention, for the purpose of doing such an injury to the plaintiffs in their business, and in the knowledge that what they were doing would so injure them; . . . that it was not for the mere purpose of forwarding fairly Allen's own interests, but from the indirect motive of doing a mischief to the plaintiffs in their lawful business." And in a succeeding sentence his Lordship explains that, "while there are acts which one may lawfully do without complaint, the same act if done for the purpose of depriving or hindering another person to your knowledge in the doing of something which he has a right to do, or in the enjoyment of something which he has the right to enjoy," may be malicious, and, in the view to which his Lordship gave effect, might warrant a claim of damages.

The learned judge was probably bound to lay down the law in the terms he used, having regard to the judgments delivered in the Court of Appeal in the case of *Temperton* v. *Russell* (1), which, in the view of Rigby L.J., governed the decision of this case.

I confess that, even if the direction given were sound in law, as I think it was not, the facts of the case were such as I should have thought should have precluded such a verdict being given, if these, with the assistance of the learned judge, had received the weight to which they were entitled at the hands of the jury. If anything is clear on the evidence, it seems to me to be this—that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did—that this was his motive of action,

(1) [1893] 1 Q. B. 715.

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and not a desire, to use the words of the learned judge, "to do mischief to the plaintiffs in their lawful calling."

The case was one of competition in labour, which, in my opinion, is in all essentials analogous to competition in trade, and to which the same principles must apply; and I ask myself what would be the thought of the application of the word "malicious" to the conduct of a tradesman who induces the customer of another tradesman to cease making purchases from one with whom he had long dealt, and instead to deal with him, a rival in trade. The case before the jury was, in my view, in no way different, except that in the one case there was competition in labour—in the other there would be competition in trade.

Some of the learned consulted judges speak of Allen's conduct as having been caused by a desire to inflict "punishment" on the shipwrights for past acts, and indicate that, if the shipwrights had been actually working at ironwork on the vessel at the time, the case would have been different. I cannot agree in any such view. "Punishment" in a wide and popular sense may possibly be used, though incorrectly, to describe the boiler-makers' action; but it is quite clear that what they were resolved to do, and really did, was, while marking their sense of the injury which they thought (rightly or wrongly is not the question) the shipwrights were doing to them in trenching on their proper line of business, to take a practical measure in their own defence. Their object was to benefit themselves in their own business as working boiler-makers, and to prevent a recurrence in the future of what they considered an improper invasion on their special department of work. How this could possibly be regarded as "malicious," even in any secondary sense that can reasonably be attributed to that term, I cannot see.

Again, the expression was repeatedly used in the argument, and has been also adopted by some of the learned judges, that the men, or rather their representative, Allen, had used "threats" in his communications with the employers which were represented as improper, and which afforded evidence to support the view that their action was malicious. What were

these threats? Simply this—that if the plaintiffs were continued in the employment they, the boiler-makers, would leave. Threats may, like false or fraudulent representations, be of such a nature, if used, as to amount to improper and unlawful means used to induce action which may be injurious to others, causing them loss and damage, and I should not for a moment say that damages might not in cases of such threats be recoverable. But this can only apply to threats of violence, intimidation, obstruction, or the like—threats which may be described as menace which improperly affects freedom of action in the person who is induced to act or to refrain from acting. The boiler-makers were quite entitled to resolve that they would not then or at any future time work at the same vessel, or even in the same yard, with the plaintiffs. No one can dispute their right so to resolve. They were quite entitled, having formed that resolution, to inform their employers that they had done so; indeed, I should say that the defendant Allen was only doing what was right and proper in intimating this resolution to the employers, in place of allowing the men to leave without notice to the employers of what would certainly cause them great inconvenience and loss. There was no threat of the nature of menace so as to amount to the use of illegal means to induce the employers to act—no threat to do anything beyond the exercise of their legal right. A master who warns his servant that a repetition of certain faults will result in dismissal may be said to use a threat; but he is not only acting lawfully, but in most cases is to be commended for so doing in place of giving an instant dismissal.

One of the learned judges—the late Cave J.—has expressed the opinion that if a butler who, for some reason or another, has made up his mind that he will no longer continue in service with the cook, with whom he has been in the same employment, should intimate his resolution to the employer, and the services of the cook should thereupon be dispensed with, the cook will have in law a claim of damages against the butler. If this view were sound, then the plaintiffs in this case might be entitled to succeed. Indeed, I have always thought throughout the course of the argument that the case put by the learned

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judge is perhaps the simplest form in which the very question now under discussion could be raised. But, with great deference to the opinion of the learned judge, no such claim could arise in such circumstances, because it cannot be truly said that on the part of the butler there was either an unlawful act, or unlawful means used in the doing of a lawful act. A servant is surely entitled, for any reason sufficient in his judgment, or even from caprice, I should say, to resolve that he will no longer continue, after the expiry of a current engagement, in service with another servant in the same employment. This being unquestionable, the only limitation on his right to act is that he must not use unlawful means to induce his employer to dispense with the services of his fellow-servant. Should his master ask him the reason for his giving up the service, he is surely entitled to give the true reason, leaving the master to act as he thinks best in determining with which of two servants he will part; and the notion of a claim of damages by his fellow-servant would be extravagant. It can make no difference that he thinks it right at his own hand to inform his master of the resolution he has taken, and I must add, with reference to what I have immediately to say, that his action being lawful, and no unlawful means being used in carrying it out, the motive, even if it be personal ill-will to another, would not, in my opinion, create liability to a claim of damages.

Coming now directly to the merits of the question in controversy in the case, the argument of the plaintiffs and the reasons for the opinions of the majority of the consulted judges seem to me to fail, because, although it is no doubt true that the plaintiffs were entitled to pursue their trade as workmen "without hindrance," their right to do so was qualified by an equal right, and indeed the same right, on the part of other workmen. The hindrance must not be of an unlawful character. It must not be by unlawful action. Amongst the rights of all workmen is the right of competition. In the like manner and to the same extent as a workman has a right to pursue his work or labour without hindrance, a trader has a right to trade without hindrance. That right is subject to the right of others to trade also, and to subject him to competition—competition

which is in itself lawful, and which cannot be complained of where no unlawful means (in the sense I have already explained) have been employed. The matter has been settled in so far as competition in trade is concerned by the judgment of this House in the *Mogul Steamship Co. Case*. (1) I can see no reason for saying that a different principle should apply to competition in labour. In the course of such competition, and with a view to secure an advantage to himself, I can find no reason for saying that a workman is not within his legal rights in resolving that he will decline to work in the same employment with certain other persons, and in intimating that resolution to his employers.

It is further to be observed, distinguishing the case from one in which a contract might have subsisted between the plaintiffs and their employers for a definite period, or for the work, it might be, on a particular ship until the whole was completed (in which case the refusal to continue to give the work would be a breach of contract on the employers' part), that there was here no such breach of contract. The employers' act in dispensing with the services of the plaintiffs at the end of any day was a lawful act on their part. The defendant induced them only to do what they were entitled to do, and, in the absence of any fraud or other unlawful means used to bring this about, the action fails.

As already fully explained, there was no case of malice in the ordinary sense of the term, as meaning personal ill-will, presented to the jury; but I agree with those of your Lordships who hold that, even if such a motive had existed in the mind of the defendant, this would not have created liability in damages. On the grounds already stated, I think the defendant only exercised a legal right in intimating that the boiler-makers would leave work if the plaintiffs were continued; he used no fraud or illegal means in the assertion of that right; and the exercise by a person of a legal right does not become illegal because the motive of action is improper or malicious: *Bradford Corporation* v. *Pickles* (2) and the *Mogul Steamship Co. Case* (1) already cited. In the former of these cases my noble and learned friend Lord

(1) [1892] A. C. 25. (2) [1895] A. C. 587.

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Watson said: "No use of property which would be legal, if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious." It seems to me with reference also to the judgment in the latter case, bearing on the rights of competitors in trade, that on the same principle it may be affirmed that the exercise of any legal right in the course of competition in labour or in trade does not become illegal because it is prompted by a motive which is improper or even malicious.

My noble and learned friends Lord Herschell and Lord Macnaghten have reserved their opinions as to the law applicable to a case in which the ground of action is that the defendant had induced an employer to commit a breach of contract, as in the cases of *Lumley* v. *Gye* (1), *Bowen* v. *Hall* (2), and the first branch of *Temperton* v. *Russell.* (3) I desire also to reserve my opinion as to that case. The person who has committed a breach of contract is of course liable in damages in consequence. If it has not yet been decided by this House that a third party who had, without the use of fraud or other unlawful means, induced the contracting party to break his contract himself thereby incurs liability in damages, the question seems to me worthy of full discussion and consideration. The proper and usual application of the maxim "Qui facit per alium facit per se" in cases in which a wrongful act has been performed is to hold the person who has committed the wrong, i.e. in the case supposed, the person who has broken his contract, liable although his act has been done through another acting for him; and it is at least open to consideration whether the maxim would apply to one who is not himself the wrongdoer committing a breach of contract, but only persuades or induces another to do so.

I have little, if anything, to add to what I have already said as giving my reasons or grounds of judgment. The case was not presented by the learned judge to the jury as one of conspiracy, and does not raise any question of that kind. Combination of different persons in pursuit of a legitimate trade

(1) 2 E. & B. 216. (2) 6 Q. B. D. 333.
(3) [1893] 1 Q. B. 715.

object occurred in the case of the Mogul Steamship Company, and was there held to be lawful. Combination for no such object but in pursuit really of a malicious purpose to ruin or injure another would, I should say, be clearly unlawful; but this case raises no such question.

As to the older authorities referred to in the argument, I agree in the views of my noble and learned friends Lord Herschell and Lord Watson, and I agree in thinking with them and with my learned and noble friend Lord Macnaghten that *Lumley* v. *Gye* (1) was not decided on any question of malice.

It was urged by the counsel for the respondent that a disapproval of the law laid down in *Temperton* v. *Russell* (2) and repeated in this case will be attended with dangerous consequences as extending the power of trades unions or combinations beyond limits which these cases laid down, and I am not insensible to the truth of the observation that a certain amount of restraint which these cases introduced will be removed. But if that measure of restraint was not founded, as I believe it was not, on sound legal principle, it is only right that by legal decision in this court of last resort it should be removed. And if the force of combination should be harshly or oppressively used—if it should be used in circumstances in which right-minded men would deplore its use—it must be observed that those against whom combination is so employed have precisely the same liberty of action for resisting oppressive measures and for causing those who use them to desist from that course of action.

LORD DAVEY. My Lords, in this case the jury have found (1.) that the defendant Allen maliciously induced the Glengall Iron Company to discharge the plaintiffs from their employment; (2.) that the defendant Allen maliciously induced the company not to engage the plaintiffs; and (3.) that damages to the extent of 20*l.* to each plaintiff was thereby suffered by the plaintiffs.

The learned judge directed the jury that there was no evidence of any breach of contract involved in the plaintiffs

(1) 2 E. & B. 216. (2) [1893] 1 Q. B. 715.

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being discharged by the company; that there was not a shred of evidence of any conspiracy at all; and that there was no evidence of anything amounting to intimidation or coercion in any legal sense of the term. No exception has been taken, or in my opinion could be taken, to these directions. We must, therefore, take the finding of the jury to mean that the company were "induced" by the persuasion and representations of Allen to discharge the plaintiffs, i.e., not to continue to employ them. The sense in which "maliciously" was intended to be used in the verdict is shewn, by the passage in the summing-up which has already been read and commented on by your Lordships, to be the popular sense of intending to do a mischief to the respondents. The main question which has been argued before your Lordships was whether the plaintiffs were entitled to judgment notwithstanding the findings of the jury.

The learned judge in his judgment, on further consideration after verdict, followed the decision of the Court of Appeal in *Temperton* v. *Russell* (1), and gave judgment for the plaintiffs. The Court of Appeal affirmed that decision. The Master of the Rolls considered that *Temperton* v. *Russell* (1) was an authority binding on that Court—that a thing which you may lawfully do to the injury of another, if you do it without malice, is made unlawful, and gives him a right of action if you do it with malice. The learned Lord gave additional reasons for his decision, in the course of which he laid down that whether the advice is to break a contract or not to make a contract, it has just the same effect, and that if you give advice to one not to make a contract with intent of doing an injury to the person who is going to make the contract with him, then the malice is the thing which makes that thing, which would have been a lawful thing without malice, unlawful. Lopes L.J. also said that he could see no distinction between inducing a party to a contract to break it and inducing a party to discharge a servant, as in the present case. Rigby L.J. simply followed *Temperton* v. *Russell*. (1)

I have stated the views expressed by the Court of Appeal at some length because they exactly express the points on which

(1) [1893] 1 Q. B. 715.

I am constrained to differ from them. The proposition of those learned judges, when analyzed, seems to me to amount to this: that damnum absque injuria, if accompanied by malicious intent, will give a right of action, or that a malicious motive per se amounts, or may in certain circumstances amount, to injuria. I am unable to assent to either of these propositions. "Malice, in common acceptation," says Bayley J. in the well-known case of *Bromage* v. *Prosser* (1), "means ill-will against a person; but in its legal sense it means a wrongful act done intentionally without just cause or excuse." If so, it seems to be an argument in a circle to say that an act not otherwise wrongful becomes so if malicious. Nor can I agree that there is no legal difference between persuasion to break a contract and persuasion not to enter into a contract. In the former case, if the persuasion is successful, the other party is deprived of the benefit of having his contract completed. In the latter case, he loses nothing to which he has a legal right, and he has no legal ground of complaint against the person who refuses to contract with him. In the one case there is a violation of right; in the other case there is not.

I accept for the present purpose without comment the doctrine laid down in *Lumley* v. *Gye* (2) and *Bowen* v. *Hall* (3), that to maliciously induce one to break a contract of exclusive personal service with an employer to the injury of that employer is actionable. But a perusal of the judgments delivered by the learned judges in *Lumley* v. *Gye* (2) shews that in their opinion at any rate it was vital to the plaintiffs' case that there was a subsisting contract of service. Crompton J. says (4) that a person who maliciously interrupts the relation subsisting between master and servant during the time stipulated as the period of service commits a wrongful act for which he is responsible at law. And answering the argument that the rule did not apply where the service had not commenced, although there was an existing contract, the learned judge says: "I think that the relation of master and servant subsists sufficiently for the purpose of such an action during the time for which

(1) 4 B. & C. at p. 247.
(2) 2 E. & B. 216.
(3) 6 Q. B. D. 333.
(4) 2 E. & B. 224.

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there is in existence a binding contract of hiring and service between the parties." Erle J. states the general principle thus: (1) "He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract."

An employer may discharge a workman (with whom he has no contract), or may refuse to employ one from the most mistaken, capricious, malicious, or morally reprehensible motives that can be conceived, but the workman has no right of action against him. It seems to me strange to say that the principal who does the act is under no liability, but the accessory who has advised him to do so without any otherwise wrongful act is under liability.

To persuade a person to do or abstain from doing what that person is entitled at his own will to do or abstain from doing is lawful and in some cases meritorious, although the result of the advice may be damage to another. This, I will remind your Lordships, is not a case of conspiracy. I do not say whether, if it were, it would or would not make an essential difference. But I do say that I am not aware of any authority binding on this House for holding, and it humbly appears to me to be against sound principle to hold, that the additional ingredient of malicious motive should give a right of action against an individual for an act which if done without malice would not be wrongful, although it results in damage to a third person. The case of libel on a privileged occasion is, of course, altogether different. A libel is held to be excused if the words complained of were used on a privileged occasion. But that excuse may be rebutted by proof of express malice and abuse of the privilege.

In my opinion the somewhat anomalous action for malicious prosecution is based on the same principle. From motives of public policy the law gives protection to persons prosecuting, even where there is no reasonable or probable cause for the prosecution. But if the person abuses his privilege for the indulgence of his personal spite he loses the protection, and is

(1) 2 E. & B. 233.

liable to an action, not for the malice but for the wrong done in subjecting another to the annoyance, expense, and possible loss of reputation of a causeless prosecution.

It was, however, argued that the act of the appellant in the present case was a violation of the right which every man has to pursue a lawful trade and calling, and that the violation of this right is actionable. I remark in passing that, if this be so, the right of action must be independent of the question of malice, except in the legal sense. The right which a man has to pursue his trade or calling is qualified by the equal right of others to do the same and compete with him, though to his damage. And it is obvious that a general abstract right of this character stands on a different footing from such a private particular right as the right to performance of a contract into which one has entered. A man has no right to be employed by any particular employer, and has no right to any particular employment if it depends on the will of another.

But is there any such general cause of action irrespective of the means employed or mode of interference? I think it unnecessary to comment on all the cases which have been cited by counsel, and are referred to by the learned judges. I have read them carefully, and I am satisfied that in no one of them was anything decided which is an authority for the abstract proposition maintained. In every one of them you find there was either violence or the threat of violence, obstruction of the highway, or the access to the plaintiff's premises, nuisance, or other unlawful acts done to the damage of the plaintiff. Nor does it appear to me that the gist of the action in those cases was that the plaintiff was a trader or exercised a profitable calling. That circumstance, no doubt, afforded evidence of the damage. But I suppose that if a person obstructed the access to my house or to my vessel by molesting and firing guns at persons resorting thither on their lawful occasions, I may have my action against him, though I do not keep a school, or I am not a trader, but sailing in my yacht for my own pleasure. Or, if a person obstructs my free use of the highway, and I suffer damage thereby, I have a right of action, though my carriage does not ply for hire, but is used

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only for my own purposes. It is strange that if there be any such right of action for interference with trade, there is not to be found some clear authority in the law books in its favour. And, as remarked by one of the learned judges, if those who argued and those who decided *Lumley* v. *Gye* (1) had been aware of any such general doctrine, it would have disposed of that case without the elaborate consideration to be found in the judgments. I do not think that the well-known action for slander of a trader's goods supports the larger proposition attempted to be founded on it. Blackstone treats that action as a particular example of slanderous words. And it appears to me an obvious fallacy to argue backwards from the existence of some recognised and well-known cause of action to a larger and wider legal proposition of which the cause of action in question might be treated as a particular case if the larger proposition had been generally recognised.

The authority most relied on in support of the proposition maintained by the respondents is the well known case of *Keeble* v. *Hickeringill* (2), or, more properly, the dicta of Lord Holt as reported in the note to 11 East. That case was an action by the owner of a decoy pond against the defendant for driving away his wild fowl by firing guns with intent to damnify the plaintiff. It appears to have been twice argued, and there are four separate reports of it, which do not altogether agree as to the grounds of the judgment. But I think it was decided on the ground that the act of the defendant was a wilful disturbance of the enjoyment by the plaintiff of his own land for a lawful and profitable purpose, and what is called in law a nuisance. The reported cases in which the case has been followed, *Carrington* v. *Taylor* (3) and *Ibbotson* v. *Peat* (4), support this view. If this be a correct view of the decision, it is no authority for the larger proposition founded on it by the respondents; and the dicta of Lord Holt, however much entitled to respect, are inadequate to support the weight which it is sought to place upon them.

Another point was made at your Lordships' bar. It was

(1) 2 E. & B. 216.
(2) 11 East, 574, n.
(3) 11 East, 571.
(4) 3 H. & C. 644.

contended that Allen was guilty of wilful misrepresentation in what he told Halkett—that the men never really intended to strike; and that Allen knowingly exceeded his instructions, or what the men had authorized him to say, when he said that they would do so. This is a question of fact to be determined on the evidence, and it might and should have been submitted to the jury. In my view such a state of facts amounting to a charge of fraud would have constituted a legal wrong and have been of the essence of the action. The point should therefore, in my opinion, have been pleaded. But it is not to be found in the pleadings, and I cannot find a trace of its having been taken at the trial. No reference to such a question is to be found in the very full summing-up of the learned judge. At the end of the summing-up the judge, having read the questions he proposed to leave to the jury, asked the learned counsel whether there was any other question which either of them wished to suggest—to which they replied in the negative. The point was not raised by the leading counsel for the respondents at the first hearing at your Lordships' bar, and it was made by Mr. Isaacs, the junior counsel, for the first time. It was, however, adopted by Mr. Lawson Walton at the second hearing. So far as I can understand, the contention of counsel for the respondents at the trial was the exact contrary, as they were then endeavouring to recover against the other defendants, the representatives of the union. It is not the practice of your Lordships where there has been a trial by jury to allow a new issue or question to be raised at the bar which might and ought to have been, but was not, submitted to the jury for their consideration on the evidence. To do so would be to usurp the function of the jury. I do not, therefore, find it necessary to express any opinion on the point.

I am of opinion that the judgment of the Court of Appeal should be reversed, and judgment entered for the appellant.

LORD JAMES of HEREFORD. (1) My Lords, this action is brought by certain shipwrights, members of a trades union, who were in April, 1894, employed by the Glengall Iron

(1) Read by Lord Shand in Lord James's absence.

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Company on the repairs of a ship called the *Sam Weller*. The defendant Allen was a district delegate of the boiler-makers' union, also a trades union. Workmen belonging to this latter union were also in the employ of the Glengall Company, and objection was taken by these workmen to the employment of the plaintiffs by the company. This objection was founded on the fact that shortly before such employment the plaintiffs had, whilst in the employ of another firm, executed certain iron-work—a class of work which the boiler-makers' union claimed should be executed only by boiler-makers.

In order to enforce this objection one of the workmen belonging to the boiler-makers' union telegraphed to the defendant to come to the ship under repair. He complied with the request, and in his official capacity as a district delegate had an interview with the boiler-makers working on the ship. From them he learnt that their discontent on account of the shipwrights being employed by the company was so great that they (the boiler-makers) had determined at once to cease work. Against the pursuing of such a course the defendant—the present appellant—strongly and successfully protested. He then sought an interview with the representatives of the employing company, and informed them that if they continued to employ the plaintiffs—the present respondents—the boiler-makers would cease to work for the company. There is a conflict of evidence as to the exact words used by the appellant in order to convey this information. It is left in doubt whether he said that if the shipwrights' employment continued the boiler-makers would be called out by their union, or would discontinue work of their own accord. The complexion of the evidence more favourable to the respondents ought to prevail. The exact words used, however, do not appear to me to affect the decision that should be given in this case.

In consequence of this communication made by the appellant the company's representatives determined to discontinue the employment of the respondents. This determination was arrived at in order to avoid the inconvenience that would arise if the boiler-makers discontinued to work on the ship under repair. It is an important fact that by carrying this deter-

mination into effect the company committed no unlawful act; no contract was broken; there was simply a refusal to renew a hiring—that is, to enter into a new contract.

Upon this state of facts the respondents brought their action against the present appellant and others, the cause of action in the 5th paragraph of the claim being thus alleged: "The defendant has maliciously and wrongfully, and with intent to injure the plaintiffs, intimidated and coerced the Glengall Company to break their contracts with the plaintiffs to the plaintiffs' damage, and has further intimidated and coerced the Glengall Company and others not to enter into new contracts with the plaintiffs whereby the plaintiffs have suffered damage."

It was admitted during the trial that the first head of this claim could not be supported, for, as I have said, the Glengall Company broke no contract. The question, therefore, is confined within the second alleged cause of action. Thus your Lordships have to determine whether there was sufficient evidence given at the trial to support the allegation that the appellant "intimidated and coerced the Glengall Company" not to employ the respondents; and, secondly, it is advisable to consider whether in any view of the appellant's conduct there was evidence to support a cause of action.

Looking at the facts, I come to the conclusion that the appellant cannot be said to have intimidated or coerced (within the legal meaning to be given to those words) the Glengall Company. It is true he informed the company's representative of the existing intention of the boiler-makers; but that intention to discontinue work if the respondents were further employed was not formed in consequence of any words or act of the appellant. He had learnt that that intention was formed by the boiler-makers before his arrival at the ship. For him to communicate such intention to the company did not injure the respondents. The boiler-makers would have acted upon it whether the company knew or were ignorant of their resolution. For they were about to desert their work when the appellant by his threat prevented them from doing so, and prevailed upon them to give him an opportunity of communicating with the representatives of the company.

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For myself I believe that the appellant communicated only the boiler-makers' preformed intention; but even if he said that the union would call out the boiler-makers if the respondents were further employed, I presume he was only communicating that which he knew would be the fact, and he was therefore warning the company's representatives not to pursue a course which would be detrimental to the company's interests.

The appellant doubtless desired that the boiler-makers' view of their claim, that they alone should execute ironwork, should prevail, and, therefore, that steps should be taken to secure to them the success of that claim, and so naturally he would use solicitation and persuasion to the company's representatives with the intention of procuring the non-employment of the respondents. Thus it appears to me that the question for your Lordships' decision is thus resolved: Is it actionable for A. to solicit and persuade B. not to enter into a contract with C.?

Before dealing with the answer that ought to be given to this question, it is worthy of observation that there were three actors in the events leading to the non-employment of the respondents: (1.) the boiler-makers who refused to work with them; (2.) the appellant who communicated that refusal to the Glengall Company; and (3.) the representatives of the company who, in consequence of the expressed intention of the boiler-makers, determined not further to employ the respondents.

In all substance the injury inflicted upon the respondents proceeded in the first degree from the action of the boiler-makers, and in the second from the action of the company in yielding to the demand of the boiler-makers. That the appellant took part in the transaction is true, but he played but a very minor part, and if he had never appeared on the scene at all the injury to the respondents would have been the same, for the company would equally have exercised their option and would have refused to employ the respondents in order to secure the services of the boiler-makers. Under these circumstances it seems strange that it is not alleged that any action lies against the boiler-makers, and that it should be distinctly

admitted that no cause of action can be maintained against the company.

If the principles laid down in the judgment of Lord Esher in the case of *Bowen* v. *Hall* (1) and in the case of *Temperton* v. *Russell* (2) were applied to the ordinary affairs of life, great inconvenience as well as injustice would ensue. Every competitor for a contract who alleged that he was the best person to fulfil it would be liable to an action. Take the case of an architect who seeks to be employed to the exclusion of his rivals. He says: "My plans are the best, and following them will produce the best house at the least cost. Therefore employ me and not A. or B." If he be so employed the architect would, according to the dicta in *Bowen* v. *Hall* (1), be liable to an action at the suit of his rivals. For he has induced a person not to enter into a contract with a third person, and his object clearly was to benefit himself at the expense of such third person. Indeed, if the opinion delivered by the late Cave J., that it is actionable for a cook to say to her master, "Discharge the butler or I will leave you," is correct, in that case the ingredient of "being desirous to benefit herself at the expense of a third person" is wanting. For the objection of the cook might well proceed from a motive which would not represent any gain to herself.

But I am aware that it was urged at the Bar that, even if the views which I have expressed to your Lordships be correct, there is an exception from general principles in favour of those whose trade or employment has been interfered with. I do not assent to this view. Before discussing the question it is necessary that some definition of the words "interfered with" in their legal sense should be given. Every man's business is liable to be "interfered with" by the action of another, and yet no action lies for such interference. Competition represents "interference," and yet it is in the interest of the community that it should exist. A new invention utterly ousting an old trade would certainly "interfere with" it. If, too, this loose language is to be held to represent a legal definition of liability, very grave consequences would follow.

(1) 6 Q. B. D. 333. (2) [1893] 1 Q. B. 715.

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Of course the conduct of the boiler-makers in the case before your Lordships amounted to an interference with the plaintiffs' business, and yet, as has been pointed out, it is not said that an action lies against them. Every organiser of a strike, in order to obtain higher wages, "interferes with" the employer carrying on his business; also every member of an employers' federation who persuades his co-employer to lock out his workmen must "interfere with" those workmen. Yet I do not think it will be argued that an action can be maintained in either case on account of such interference. But whatever meaning may be attached to the words "interfere with," I see no ground for saying that any different rule should be applied to cases of interference with a man when carrying on his trade or business, or when he is engaged in any other pursuit. In the *Mogul Steamship Co. Case* (1) there was an extreme case of interference with the plaintiffs' business by methods which directly injured the plaintiffs in their trade for the express purpose of benefiting the defendants. The admitted interference was carried on by several defendants in a combination which in one sense amounted to a conspiracy, yet it was held by this House that no action could be maintained, for the acts done were not unlawful and the combination was not a criminal conspiracy.

My Lords, I abstain from passing in review the older cases which refer to interference with trade or business, for they have already been very fully reviewed and dealt with. I content myself with saying that I do not think they establish more than that the interference which is in itself unlawful constitutes a cause of action. It seems somewhat contrary to common sense that an interference which is rightful when applied to general subjects becomes wrongful when a trade or business is subjected to it.

For these reasons I have, after some hesitation, come to the conclusion that inasmuch as the appellant has used no unlawful means to produce a result, and that as the result produced represents nothing that is unlawful, this action cannot be maintained. I therefore think that the decision of the Court

(1) 23 Q. B. D. 598; [1892] A. C. 25.

of Appeal should be reversed, and that judgment should be entered for the appellant. H. L. (E.) 1897 ALLEN v. FLOOD.

Order of the Court of Appeal reversed and judgment entered for the appellant with costs here and below including the costs of the trial; cause remitted to the Queen's Bench Division.

Lords' Journals, December 14, 1897.

Solicitors for appellant: *Shaen, Roscoe, Massey & Co.*
Solicitors for respondents: *C. J. Smith & Hudson.*

[The discussion of malicious prosecution and similar causes of action (see references in the head-note) seems independent of the actual *ratio decidendi*, but points, it is submitted, to the conclusion that in such cases evil motive is material because the defendant's act is in itself of a wrongful nature, and is privileged when done and only when done in good faith.—F. P.]

[HOUSE OF LORDS.]

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND . . . . } APPELLANTS; H. L. (I.) 1897 Nov. 18.

AND

LOUISA McCARTHY . . . . . RESPONDENT.

Will—General Charge of Legacies on Real Estate if Personal Estate insufficient—Subsequent Specific Devise—Presumption of Law rebutted by Intention.

A testator bequeathed pecuniary legacies to be charged in the first place upon his personalty, and if the same should be insufficient to be charged upon his real and personal estates. He then specifically devised lands at A. to G. and other lands at other places (naming them) to F. There was no residuary devise. The lands at A. and the lands specifically devised to F. formed the whole of the testator's realty. The personalty being insufficient the pecuniary legatees claimed a charge upon the lands at A.:—

Held, that upon the true construction of the will the testator's intention was that the lands at A. should be charged with the legacies, and that the presumption of law contra was therefore rebutted.

The decision of the Court of Appeal in Ireland, [1897] 1 I. R. 86, affirmed.

DANIEL McCARTHY, of Glencurragh, county Cork, by his will made in July 1859, after bequeathing various specific legacies and appointing under a power in a settlement the sum of 2000*l.* to his three daughters, to be paid to them respectively in equal

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shares and proportions upon each of them attaining the age of twenty-one years or marriage, bequeathed to his three daughters a further sum of 700*l.*, to be payable to each of them at the like rate of 5 per cent. per annum from the date of his decease, subject to the conditions mentioned as to the said sum of 2000*l.*: "the said several sums of 700*l.* to each of my said daughters and interest thereon to be paid and payable out of and charged and chargeable in the first place upon my chattel property money and effects, and if the same shall be insufficient then the said several sums to be paid and payable out of and charged and chargeable upon my real and personal estates." The testator then devised his lands at Ardagh to his second son Gerald, and in the event (which happened) of Gerald's dying without issue remainder to his eldest son Florence. He then specifically devised "subject as aforesaid" certain other lands to his eldest son Florence and appointed him his residuary legatee. There was no residuary devise. The lands devised to Florence were all the real property possessed by the testator in addition to the lands at Ardagh. Part of the lands devised to Florence was subject to a charge for an annuity to the testator's wife, and this charge was recited and confirmed at the beginning of the will. By a codicil made in June 1860 the testator bequeathed to each of his three daughters a further sum of 300*l.*, "this total sum of 900*l.* to be subject to the same conditions as the fortunes I have already left them."

The testator died in 1860, and his will and codicil were proved. In 1863 a residuary account of his estate was passed, by which it appeared that after retaining a sufficient sum to meet the legacies there was a surplus. This was assumed in the Courts below to shew that the personal estate was then sufficient to pay the legacies to the daughters; but it was pointed out by Lord Macnaghten during the argument in the House that there was only a sufficiency by including the specific bequests among the property chargeable with the legacies. One of the testator's daughters received her legacy: the other two received interest on theirs.

The second son Gerald died without issue and the lands at Ardagh passed to the eldest son Florence, and were afterwards mortgaged to the Bank of Ireland. In a suit for the adminis-

tration of the real and personal estate of Florence, the question upon which this appeal turned arose, namely, whether the unpaid legacies to two of the testator's daughters, amounting to 2000*l.* and which had become vested in the respondent, were charged on the lands at Ardagh and so had priority over the mortgage to the Bank of Ireland. The Master of the Rolls in Ireland held that the legacies were charged upon the lands at Ardagh and had priority, and this decision was affirmed by the Court of Appeal (Lord Ashbourne L.C. and FitzGibbon, Barry, and Walker L.JJ.). (1)

Nov. 16, 18. *Latham Q.C.* and *Howard Wright* for the appellants. The lands at Ardagh are not subject to the legacies for two reasons. First, lands specifically devised are not subject to a general charge of legacies, unless it plainly appears that the testator intended that they should contribute: *Spong* v. *Spong* (2); *Conron* v. *Conron* (3); *Quain* v. *Harvey*. (4) There must be clear words to rebut the presumption of law that lands specifically devised are intended to be free of the legacies. The testator's intention that the lands devised to Florence should be subject to the legacies and that the lands at Ardagh devised to Gerald should not be subject, appears from the fact that the lands devised to Florence are devised "subject as aforesaid," that is subject to the legacies previously bequeathed, whereas there are no such words in the devise to Gerald. Again the devise to Florence is a devise of the whole of his realty not specifically devised, and although not in express terms a residuary devise is so in fact.

Secondly, assuming that the legacies are charged on Ardagh, they are so charged only if the "chattel property, money and effects shall be insufficient." The question then arises, at what time is the insufficiency to be ascertained? In *Richardson* v. *Morton* (5) Lord Romilly held that the death of the testator was the proper time, and not when the legacy was payable—in that case the majority of the legatee—and that where the

(1) [1897] 1 I. R. 86.
(2) (1829) 3 Bli. (N.S.) 84, 102; 1 Dow & Cl. 365.
(3) (1858) 7 H. L. C. 168.
(4) (1880) 5 L. R. Ir. 622.
(5) (1871) L. R. 13 Eq. 123.

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personal estate was sufficient at the testator's death but was afterwards wasted, the legatee could not when he attained twenty-one resort to the lands. *Humble* v. *Humble* (1) and *Howard* v. *Chaffers* (2) are distinguishable; in both those cases the devisees of the lands charged were the executors who had wasted the personalty, and they could not set up their own wrong as an answer. The general rule adopted by Lord Romilly is applicable here. The personal estate was sufficient in 1863 when the executrix passed the residuary account shewing a surplus after retaining a sum for payment of the legacies. The legatees might have sued the executrix then for the legacies, and as they have done nothing but stand by, and have by their silence acquiesced in the mortgage to the appellants they (or their representative the respondent) cannot now enforce the charge on Ardagh.

[LORD MACNAGHTEN. The residuary account in 1863 only shews a sufficiency of the personal estate for the payment of the pecuniary legacies by including the value of the specific legacies, furniture, wine &c. [His Lordship also referred to *Greetham* v. *Colton*. (3)]]

That state of things does not seem to have been observed in the Courts below. The case has been treated throughout as if there was a sufficiency at the testator's death.

Ronan Q.C. (of the Irish Bar) and *E. S. Ford* for the respondent were not heard.

LORD HERSCHELL. My Lords, the only question to be determined is the effect of the will of the testator—whether the estate of Ardagh devised to his second son Gerald is charged with certain pecuniary legacies. [His Lordship stated the parts of the will above set out.]

My Lords, the contention on behalf of the appellants is that the charge which the will undoubtedly purports to create in favour of the legatees does not extend to the lands of Ardagh devised to his son Gerald.

My Lords, the law upon the subject is now well settled by

(1) (1838) 2 Jur. 696. (2) (1863) 2 Dr. & Sm. 237.
(3) (1865) 34 Beav. 615, 621.

the decisions of this House. I take the statement of it from Lord Cranworth's judgment in the case of *Conron* v. *Conron*. (1) He says: "The question must always be one of intention, but the rule is that the presumption is against an intention to charge lands specifically devised, and that a mere charge 'on all my lands' is not sufficient to rebut that presumption." Therefore, my Lords, we are bound to start with the presumption that where land is specifically devised, if there be nothing more, the testator intends the devisee to take that land without any derogation, and that a mere charge of some legacies on all his lands is not sufficient to rebut that presumption; but after all it is a question of intention, and if there is something more or something other than the mere fact of a charge upon all his lands, then we have to consider from the whole will what is the intention which we are to attribute to the testator.

Now, my Lords, in the case of *Conron* v. *Conron* (1) and the previous case of *Spong* v. *Spong* (2), upon which it was founded, there was a residuary devise of real estate; and it was quite natural that, adopting the law laid down by Lord Cranworth, the conclusion arrived at should be that it was this residuary estate that was intended to be charged, and not the real estate specifically devised. But in the present case the devise of the real estate to Gerald and the devise of the other property to Florence immediately followed this charge, and there is no residuary devise. Apart from the point to which I will allude in a moment, if the devise to Florence is to be treated as being as specific as the devise to Gerald, then the charge would be wholly ineffectual; there would be nothing charged at all, in spite of the testator having manifested a clear intention that the legatees should be protected by a charge on the real estate.

But it is said that the devise to Florence is really a residuary devise, inasmuch as it comprised all the real estate that the testator had to dispose of as a matter of fact, and that consequently the devise to Florence ought to be treated as a residuary devise, and to be dealt with in precisely the same way as if there had been a residuary devise of the real estate to Florence—a residuary devise which included all the real estate

(1) 7 H. L. C. 168, 190. (2) 3 Bli. (N.S.) 84; 1 Dow. & Cl. 365.

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which is in form specifically devised. My Lords, I do not think that is a tenable argument; it is not a residuary devise in terms: it is a devise as specific as the devise to Gerald; it devises to him certain property therein mentioned as it had devised to Gerald the other property mentioned in the devise to him; and I do not think it would be possible to come to the conclusion, on any sound reasoning, that this devise to Florence was to be treated as a residuary devise, and as the only subject of the charge.

Then the only other point made as distinguishing the two devises is that, whereas the devise to Florence begins with the words "subject as aforesaid," no such words are to be found in the devise to Gerald. My Lords, I think the argument was an ingenious one, but I think it is far too slender a thread upon which to rest a conclusion as to the intention of a testator such as the learned counsel for the appellants asked your Lordships to accept. Ample explanation may be given of the introduction of those words into the devise to Florence and not into the devise to Gerald, having regard to the subject-matters dealt with in the devise to Florence and the previous recitals in the will with regard to them, without attributing the introduction of those words to an intention on the part of the testator to charge with the legacies the lands devised to Florence and not to charge with the legacies the lands devised to Gerald.

On the whole then, applying fully the principle laid down by Lord Cranworth in the case of *Conron* v. *Conron* (1), I am unable to arrive at any other conclusion than that the Ardagh estate is charged with these legacies.

In the Court below the learned Master of the Rolls treated the words "personal estate" in the charging clause as words that could be in no case operative, and which therefore were meaningless. My Lords, it is not necessary to pronounce any decision upon that question; but, in view of its possibly affecting the rights of the parties, I desire only to say that I agree with what my noble and learned friend Lord Macnaghten said in the course of the argument—that it is not by any means clear that those words must be treated as meaningless.

(1) 7 H. L. C. 168, 190.

My Lords, that disposes of the main question argued, and, as it seems to me, really the only question that now remains. It was said that, granting that the lands of Ardagh are included in the charge, the charge is a conditional one and only to operate in case the personal estate is insufficient; it was further said that the personal estate at the time of the death was sufficient, and that was the period at which the condition must be fulfilled. My Lords, it is unnecessary to express any opinion upon the argument dealing with that part of the case because, though it was assumed, no doubt from the form of the residuary account, that the personal estate was sufficient at the time of the death, it now turns out that it was not sufficient at the time of the death when you have regard to the fact that to make it sufficient you must include in your account the personalty specifically bequeathed. Therefore the charge, if it covered Ardagh at all, undoubtedly came into operation.

One other point is raised. It is said, granting that the charge upon Ardagh came into operation, it is now at an end because of laches or negligence or want of due diligence on the part of the persons entitled to the benefit of the charge. My Lords, I am quite unable to see that there is anything in that point at all. The case, of course, must now be argued upon the hypothesis that the personal estate was at the outset insufficient and that the land became charged with these legacies; and that being so, I cannot see any duty upon the part of the legatees the failure to perform which can in the slightest degree be said to have altered the legatees' rights and to have discharged the land of this charge.

For these reasons, my Lords, I move your Lordships that the judgment appealed from be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

I cannot help thinking that the learned judges in Ireland accepted rather too hastily the conclusion which the parties much too hastily deduced from the so-called residuary account. When you look at the account, it is plain that it includes items representing the value of property specifically bequeathed, and,

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of course, when you are considering what fund there was available for the payment of general legacies, all those items must be excluded. The result is, as it appears to me, that there is left a sum not amounting to 500*l.*; and consequently the personal estate must have been insufficient at the testator's death. Therefore, on any view of what the law is on the point so much discussed in the Courts below, there was a charge on whatever was comprehended under the words "real and personal estate" in that clause of the will which has been termed the charging clause. My Lords, I am not sure that there is so great a difference of opinion as has been suggested between Lord Romilly and the Courts in Ireland if Lord Romilly's latest decision be taken into account; certainly there is some difficulty in reconciling the principle which his Lordship laid down in *Greetham* v. *Colton* (1) with what he said in *Richardson* v. *Morton*. (2) However, it is not necessary for your Lordships to determine that question—it has become immaterial. It is clear that the charge, whatever it was, came into operation. As to the words "personal estate," I agree with what fell from my noble and learned friend now on the woolsack. I am by no means sure that the word "personal" in the clause which has been referred to is insensible, as the Master of the Rolls seems to think. But, again, it is not necessary for your Lordships on this occasion to decide the question. There is a charge on the testator's real estate. Now, I agree that that charge affects the lands of Ardagh as well as the lands devised to the eldest son. I think that Mr. Latham went too far when he called the devise to the eldest son a residuary devise—it is not a residuary devise at all. If the testator had purchased land after the date of his will, and not disposed of it otherwise, the eldest son would not have taken it under this devise. It is only in the nature of a residuary devise because it happens to come last and exhausts all the real estate belonging to the testator at the time. But Mr. Latham hesitated to assert as a general proposition that when a testator has disposed of all his property by a series of specific devises the last specific devise becomes a residuary devise.

(1) 34 Beav. 615. (2) L. R. 13 Eq. 123.

My Lords, I do not think it is necessary to say anything about the question of laches; there really is nothing upon which a shred of argument could be hung.

For these reasons I agree with the motion which my noble and learned friend has proposed.

LORD MORRIS. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I am also of the same opinion.

The will in its provisions declares that this charge is placed "in the first place upon my chattel property money and effects, and if the same shall be insufficient then the said several sums to be paid and payable out of and charged and chargeable upon my real and personal estates." My Lords, it humbly appears to me that if the facts had been different this clause might have raised a serious question requiring full consideration by this House; but, as has appeared from the discussion this morning, it turns out that in point of fact there was not a balance of personal estate sufficient to pay these legacies, and therefore the House is relieved from the consideration of that question.

To what has been said on the will itself, I have only to add that it appears to me that the position which the clause making these specific devises of heritable estate held in the will is not without considerable weight. It might have made a great difference in the ultimate decision of this case if these specific devises of heritable estate had preceded the words which charge, instead of following them as they do.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 18, 1897.

Solicitors for appellants: *Freshfields & Williams, for E. H. de Moleyns, Dublin.*

Solicitors for respondent: *Street, Poynder & Whatley, for T. Downes, Dublin.*

[HOUSE OF LORDS.]

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THE VESTRY OF ST. MATTHEW, BETHNAL GREEN . . . . . } APPELLANTS;

AND

THE SCHOOL BOARD FOR LONDON (BY F. H. PEACOCK, PROSECUTING ON THEIR BEHALF IN THE NAME OF THE QUEEN) . . . . . } RESPONDENTS.

Metropolis—Sewer—Drain—Liability to Repair—Sewer made without Approval of Vestry or Metropolitan Board of Works—Metropolis Management Act 1855 *c.* 120 *ss.* 68, 69, 74, 250—*Metropolis Management Amendment Act* 1862 *c.* 102 *ss.* 47, 48, 61.

The fact that the requisite sanction and approval for the making of a sewer in the metropolis was not obtained from the vestry or Metropolitan Board of Works does not prevent it, when made, from being a sewer within the meaning of the Metropolis Management Acts, and as such vested in the vestry and repairable by them.

In 1866 the owner of a block of houses in the metropolis laid down a pipe to carry off the drainage from them, and connected the pipe with a sewer belonging to the vestry in a neighbouring street. There was no evidence of any notice having been given to the vestry, or of any order having been made by them, or of their sanction or of the approval of the Metropolitan Board of Works having been obtained, under the Metropolis Management Act 1855 or the Amendment Act 1862:—

Held, that the probable inference of fact was that the pipe was laid with the sanction of the vestry and the approval of the Metropolitan Board of Works required by the Acts; but that whether that was so or not the pipe was a sewer within the meaning of s. 250 of the Act of 1855, and was consequently vested in the vestry and repairable by them.

The decision of the Court of Appeal, [1896] 2 Q. B. 319, affirmed.

BEFORE 1866 a block of houses in Tyrell Street in the parish of St. Matthew, Bethnal Green, had cesspools on their premises and no other drainage. In 1866 the owner of the houses laid down a pipe in the yards at the rear of the houses to carry off their drainage, and connected the pipe with a sewer belonging to the vestry in Turin Street, running at right angles to Tyrell Street. There was no evidence that any notice had been given to the vestry or any order made by them, or that

their sanction or the approval of the Metropolitan Board of Works had been obtained or asked for. In 1894 the School Board for London acquired the site, and finding the pipe defective called upon the vestry to repair it. The vestry having declined to do so on the ground that the pipe was not a sewer vested in or repairable by them, the school board obtained a rule nisi for a mandamus commanding the vestry to repair. This rule was made absolute by the Queen's Bench Division (Lord Russell of Killowen C.J. and Wright J. (1), and this decision was affirmed by the Court of Appeal (Lord Esher M.R. and A. L. Smith L.J.). (2)

Nov. 19, 25, 26. *Sir E. Clarke Q.C.* and *Asquith Q.C.* (*Beven* with them) for the appellants. The drain in question is a "drain" and not a "sewer" within the definition of s. 250 of the Metropolis Local Management Act 1855. At this distance of time the proper presumption is that it was laid as a drain for draining a block of houses by a combined operation under s. 74 of that Act, which empowers a vestry to make an order for such a drain, when a sewer exists within 100 feet of any part of the block. A lawful origin should be presumed wherever possible, and the only lawful origin for this drain is an order of the vestry under s. 74. Such an order need not be express or in writing: if the vestry approves it is equivalent to an order: *Bateman* v. *Poplar District Board of Works* (3), where it was held that s. 74 must be read with s. 73: see also s. 76; the acquiescence of the vestry would be equivalent to an order. This pipe is therefore a "drain" within s. 250 of the Act of 1855 and is not vested in or repairable by the vestry. The decision of the Court below is that where a person unlawfully makes a drain without the requisite sanction he can evade the burden of repair (which would fall on him if the drain were lawfully made) and throw it upon the vestry. That cannot be the intention of the Legislature. By s. 69 of the Act of 1855 "no new sewer shall be made without the previous approval of the Metropolitan Board of Works." It cannot have been

(1) [1896] 2 Q. B. 95. (2) [1896] 2 Q. B. 319.
(3) (1886) 33 Ch. D. 360.

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intended that a drain made without that approval should vest in the vestry and be repairable by the vestry. The Metropolis Management Amendment Act 1862 carries the matter further. By s. 47 every person intending to make a sewer shall in the first instance lay the plan and section before, and apply for the sanction of the vestry, and no sewer shall be begun to be made till the sanction in writing of the vestry has been obtained. Therefore a sewer made without such sanction is unlawfully made. By s. 48 before the vestry can sanction any such sewer they must submit the plan and section to the Metropolitan Board of Works for their approval: and the vestry is forbidden to sanction without such approval in writing.

There being no vestige of evidence of any such sanction by the vestry or approval by the Metropolitan Board of Works ever having been given, the reasonable inference is that this drain was made without it. If no presumption is to be made of an order of the vestry under s. 74 of the Act of 1855, why should any presumption be made of a sanction or an approval under the Act of 1862? This view is confirmed by s. 61 of the Act of 1862 which repeals s. 77 of the Act of 1855 and forbids any person to make any sewer or drain without the previous consent of the vestry. These considerations do not seem to have been present to the mind of the Court in *Kershaw* v. *Taylor*. (1) That case is erroneous so far as it decides that a drain necessarily becomes a sewer from the point where it receives the drainage of more than one building. The words in s. 68 of the Act of 1855, all sewers "to be made" must be read with some limitation; i.e. all sewers to be made under the provisions and with the sanction and approval of that Act or subsequent Acts.

Bosanquet Q.C. and *R. Cunningham Glen* for the respondents. The sewer is a sewer within s. 250 of the Act of 1855 unless the appellants can shew that it is a drain for draining a block of houses by a combined operation under the order of the vestry: and the onus lies on them. They cannot shew it because there is no evidence of the order. Hence it is a sewer and vests in the vestry under s. 68 of the Act of 1855, and is repairable by

(1) [1895] 2 Q. B. 471.

the vestry under s. 69. It is no hardship on the vestry: they might have stopped the making at the time, and broken the connection with the sewer in Turin Street. As they left it it must be presumed that they thought it was for the general benefit. Any person who is aggrieved by any order or act of any vestry in such matters may appeal to the Metropolitan Board of Works under s. 211 of the Act of 1855. The making of this sewer and the connection with the sewer in Turin Street could not have been done secretly: it must have been done publicly and no doubt was done with the sanction of the vestry and the approval of the Metropolitan Board of Works. But if it was not it was still done, and as it is a "sewer" in the statutory sense the vestry must repair it. There is no limitation in the Acts of the word "sewer" to sewers made with the statutory sanction and approval. And see s. 112 of the Act of 1862.

Asquith Q.C. in reply.

LORD HALSBURY L.C. My Lords, I cannot forbear from saying that I think the circumstances under which this case comes before your Lordships are a little unsatisfactory in this respect, that we have not all the facts that we might have had, and all the light which might have been thrown on the position of affairs by a more accurate description of the premises in respect to which this matter arises. The parties, I think, do not sufficiently seem to have regarded the importance of having the whole of the drainage system before your Lordships, and have confined their attention to a plan which, looking at it by itself, is, I think, a little misleading; but now that the matter has been explained and the affidavits carefully looked to, the question of fact appears to be very clear that, apart from the definitions which are contained in the Acts referred to, this is undoubtedly what everybody would understand by and call a sewer.

Now, as a matter of fact, this is some contrivance, ditch, drain, call it what you will (I mean apart from the technical meaning of the word "drain" in the statute), which is an artificial construction which carries the sewage of a very large

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number of houses into a pre-existing sewer in Turin Street; and I cannot entertain the smallest doubt that when that was made, by whomsoever it was made, everybody in the neighbourhood, certainly the proper officers of the vestry, must have perfectly well known what was being done. It is not a small operation: it is an operation which must have been done certainly with public notice to everybody; they must have taken up some part of the public highway, and there must have been considerable work, I should think, done for the purpose of connecting that drain with what is admitted on all hands to be an old sewer in Turin Street. I am, therefore, clearly of opinion that the inference I should draw is that that must have been known to the local authority.

We come back now to the Act of Parliament. If this is a sewer, apart from what has been described as the artificial system, a combined drain, it is impossible to avoid the application of the language of the Act of Parliament that it is vested in the vestry and made repairable by them. There are two things, and only two things so far as I see, which can prevent its being vested in the vestry, and which, if they were established, would—I think not in favour of the private proprietor, but rather against his will—subject to certain restrictions, make things which may to some extent serve a public purpose be nevertheless repairable by him and at his expense. One is, naturally and justly, that where it only applies to the drainage of a single house the proprietor must connect his private property with the public sewer, and must make and maintain that drain into the public sewer, if it is a single house. Then comes an additional provision that if a particular block of houses, a certain number of houses, may be more conveniently and economically drained by one combined system or operation, then not in aid of the proprietor but rather imposing an additional burden on him, though it is in one sense a sewer draining more than one house, nevertheless, if an order is made by the vestry that that shall be a combined operation for drainage, then, notwithstanding that that does to some extent fulfil what I would call a public function, it is to remain a drain, and therefore to be repairable by the

private proprietor. It is not denied here that there is no evidence of any such order making that combined operation into a drain and not a sewer; and inasmuch as undoubtedly the fact that it drains more than one house gets rid of the ordinary meaning of the word "drain," indeed of any meaning of the word "drain" even by this Act of Parliament except by that operation, it is manifest that those who insist upon its being a drain and not a sewer must establish as matter of proof that the order of the vestry has been made; and I know of nothing which can avoid the exigency of the Act of Parliament except an order of the vestry properly made. It cannot be denied that there is no such order; and I, for one, decline to draw the inference of fact that any such order was made, because I do not believe it was made; and no tribunal, I think, ought to draw an inference contrary to what they believe to be the fact.

But it is said the vestry themselves would have no authority to do this thing and make this sewer without the sanction of the Metropolitan Board of Works. As to that, it depends, to my mind, upon totally different considerations, because in that case the vestry, if they did it, would be in one way fulfilling the duty cast upon them by the Act of Parliament. From the description of these houses given by some of the witnesses in the affidavits, they were certainly calculated to be very deleterious to the health of the inhabitants generally. There were cesspools immediately behind the houses, the liquid slops were thrown into the street, and no one could doubt that, invested as the vestry were with the powers of insisting upon what was necessary for the health and comfort of the inhabitants, it was their duty in some way or other to provide for the drainage of these different houses.

Now, what we know as a fact is that the drainage was altered from the system which had been previously pursued, and that between thirty and forty years ago the cesspools were filled up and this long line of conduit constructed which goes into the sewer in Turin Street. I should myself draw the inference that that was done either by the vestry itself or by some other person, very likely by agreement between the vestry

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and the proprietor, each of them being desirous, the one to make the houses convenient and habitable, and the other, the vestry, in fulfilment of their duty to provide for the health and sanitation of the inhabitants of their district. By whomsoever it was done, it was done, and as a sewer.

It is said that the vestry themselves would not have power to do that without the authority of the Metropolitan Board of Works. I will assume for this purpose that as the regular and proper course of procedure they ought to have received the sanction of the Metropolitan Board of Works; but, if they did not do that, I think, although they were not fulfilling their strict administrative duty, it could not be said that it was unlawful. They were providing for a duty they had to discharge, and they ought to give notice, to get the sanction in that sense of the Metropolitan Board of Works; and I should be disposed, if it were necessary, to presume that they did, though perhaps not in the regular way, get the sanction and authority; but the fact remains that something or another was done at a distance of time between thirty and forty years from the present time, which, if it were done by the vestry and by the authority of the Metropolitan Board of Works, was lawfully and properly done; and inasmuch as there are ample powers of interference, as Mr. Bosanquet has shewn, to prevent its being done if it was unlawful, and no such interference was ever suggested, though from the nature of the thing done it was necessarily a thing which must have been known and publicly known to the authorities, I should come to the conclusion that it was done with the sanction and authority both of the vestry and of the Metropolitan Board of Works.

It seems to me, therefore, that one has exhausted the whole ground; it must be either a sewer or a private drain. I have pointed out what appears to me to be a fatal blot in the effort to make it a private drain. Therefore the only other alternative is that it must be a sewer; and if it is a sewer it is repairable by the proper local authority.

I think, therefore, my Lords, a mandamus ought to issue, and that this judgment ought to be affirmed; and I move your Lordships accordingly.

LORD HERSCHELL. My Lords, I am of the same opinion.

The sewer as to which this question arises clearly comes within the definition of "sewer" in the Act of 1855, unless it be shewn that it is taken out of that definition by being within the definition of "drain." That can only be done by shewing that it was constructed by reason of an order of the vestry under the provisions of s. 74. Now, whether if no construction of a sewer had been legal unless by virtue of such an order, it would have been right, in view of the time that has elapsed, to presume an order it is not necessary to inquire. But it is perfectly manifest that such an order is not the only way in which this sewer could be legally made. I think there is strong evidence that no such order was made, because an order is a thing of which a record would almost certainly be kept. Therefore I think it is not shewn, and there is no ground for presuming, that this combination was made by any order of the vestry. If that be so, it is a sewer within the meaning of the Act.

Then s. 68 provides that all sewers thereafter to be made shall be vested in the vestry. It is not disputed that if vested in the vestry this is repairable by the vestry. Therefore the only question is whether it is so vested in the vestry. Now, my Lords, the words are absolutely wide and unlimited, "all sewers" thereafter to be made, and it is only sought to cut down those words by suggesting that it must mean all sewers lawfully made.

First of all it is said that this sewer could not be lawfully made without the sanction of the vestry to its connection with their drainage system, and, further, without the approval of the Metropolitan Board of Works. The only evidence upon the subject of whether there was sanction and approval is an affidavit by a gentleman who has been vestry surveyor since 1884 in which he says that he can find no record either of sanction or of an application to the Metropolitan Board of Works in the vestry records. I do not think that is sufficient to justify a conclusion that this drainage arrangement connecting with the Turin Street sewer was constructed without any such sanction or approval as the statute refers

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Lord Herschell.

to. I think that when you have such a sewer as this existing for thirty years and more, and especially in view of the fact that there is power in the vestry for the health of the neighbourhood to compel owners of houses within 100 feet of a sewer to drain into that sewer, and that therefore there was power in the vestry to insist upon the owners of these houses in Tyrell Street, or at all events such as were within 100 feet of Turin Street, draining into the Turin Street sewer each by a separate drain (which under the circumstances would manifestly be inconvenient), there is every reason for supposing that the vestry would sanction a combined system of drainage which should drain not only those houses in Tyrell Street, which they could have compelled to drain into the Turin Street sewer, but also the general row of houses which it might well have been thought it was for the advantage of the neighbourhood should be drained, and of which there was no means of compelling the drainage in so far as they were beyond 100 feet from the Turin Street sewer so far as we know. Therefore, I think there is in this case good ground for presuming that the connection of this sewer for draining the houses in Tyrell Street with the sewer in Turin Street received the sanction of the vestry, and, in the absence of any distinct proof to the contrary, received the sanction of the Metropolitan Board of Works.

But, my Lords, even if that could not be made out, I do not think it would follow, if the sanction of the vestry was given, that the sewer could be held not to be a sewer within the meaning of s. 68 merely because the vestry had failed to perform their statutory duty of first submitting the plans to the Metropolitan Board of Works and obtaining their sanction. It is quite true that the statute of 1855 says that no new sewer is to be made—I think there it means made by the vestry—without the sanction of the Metropolitan Board of Works. The Act of 1862 carries it further, and provides that no person other than the vestry shall make a new sewer without the sanction of the vestry, and the vestry shall not sanction the construction of such sewer till the Metropolitan Board of Works have approved. But it does not follow that because

the requisite sanctions have not been obtained the thing constructed is not a sewer. The statute does not say "all sewers thereafter constructed with the sanctions and approvals required by this Act." If it did, of course it would have been clear that, unless such sanction or approval had been given, or was to be presumed to have been given, the construction could not be deemed a sewer within the meaning of the Act. But the Legislature has not said that, and of course there are many instances in which certain consents are requisite, and the failure to procure those assents may be a wrongful act on the part of those who ought to have obtained them, where, nevertheless, the thing when done is none the less done, and regarded as a matter which cannot be treated as absolutely void and a nullity because the requisite consents have not been obtained. So here, my Lords, I think when one looks at the very words of the Act of 1862 itself, it speaks of the thing, as to which the consents are to be obtained, as a sewer; and in the language of this legislation I think it is none the less a sewer within the meaning of the Act even though that sewer may have come into existence without an assent or approval which, as between public bodies, the statute requires.

For these reasons I think the judgment appealed from ought to be affirmed.

LORD MORRIS and LORD SHAND concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 26, 1897.

Solicitor for appellants: *Robert Voss.*
Solicitor for respondents: *C. E. Mortimer.*

[HOUSE OF LORDS.]

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THE BADISCHE ANILIN UND SODA FABRIK . . . . . } APPELLANTS;

AND

THE BASLE CHEMICAL WORKS, BINDSCHEDLER . . . . . } RESPONDENT.

Patent—Infringement — Foreign Manufacturer — Sale of Patented Article Abroad and Delivery in England—Posting Patented Article to England—Transporting Patented Article within the United Kingdom—User.

A trader in England ordered goods from a foreign manufacturer in Switzerland to be sent by post to England. The manufacturer addressed the goods to the trader in England and delivered them to the Swiss Post Office, by whom they were forwarded to England. The goods were manufactured according to an invention protected by an English patent:—

Held, that since the contract of sale was completed by delivery to the Post Office in Switzerland, and since the Post Office was the agent of the buyer and not of the vendor, the vendor had not made, used, exercised or vended the invention within the ambit of the patent, and that the patentee had no right of action against the vendor for an infringement of the patent.

The decision of the Court of Appeal, [1897] 2 Ch. 322, affirmed.

THE appellants are manufacturers of dyes and owners of letters patent in this country for improvements in the manufacture of colouring matters. The respondent Bindschedler is a Swiss subject domiciled at Basle, and carries on business there as a manufacturer of chemical products under the style of "The Basle Chemical Works, Bindschedler." In June, 1895, Henry Johnson & Co., traders in London, wrote to the respondent at Basle, "Please send us by poste immediately 5lb. Yellow T. for wool." The respondent then sent a packet of 5lb. Yellow T. to Niebergall & Goth, forwarding agents in Basle, with instructions to hold it at the disposal of Henry Johnson & Co., and advised the latter of their having done so. Niebergall & Goth, without waiting for instructions, addressed the packet to Henry Johnson & Co., in London, and delivered it to the post office at Basle, by whom it was forwarded to Henry Johnson & Co., in London, the latter paying all postage

and forwarding agents' charges. The contents of the packet were manufactured in accordance with the invention protected by the appellants' letters patent.

The appellants brought an action against Henry Johnson & Co. and the respondent, claiming an injunction against the infringement of the letters patent and consequential relief, leave being given to issue a concurrent writ and serve it on the respondent out of the jurisdiction. (1) Henry Johnson & Co. submitted to judgment for an injunction. The respondent defended the action on the ground that he had done no act within the United Kingdom, and had not made, used, exercised or vended the invention within the United Kingdom. North J. granted an injunction against him, but this decision was reversed by the Court of Appeal (Lindley and A. L. Smith L.JJ., Rigby L.J. dissenting), who dismissed the action with costs. (2)

Nov. 26, 29. *Moulton Q.C.* and *Cripps Q.C.* (*W. N. Lawson* with them) for the appellants. The appellants are the owners of letters patent which give them the sole and exclusive right to "make, use, exercise, and vend" the invention within the United Kingdom and the Isle of Man. See Form D. Sched. 1, to the Patents, Designs and Trade Marks Act 1883 c. 57. The respondent has infringed this right by sending, or causing to be sent, the invention to London, and it is quite immaterial whether the delivery at Basle to the post office was by the hands of the respondent himself or by the hands of the forwarding agents. Agency cannot alter the nature of the act done by the respondent: he is not merely the sender of the goods, it is he who brings or causes to be brought the goods into this country. It is not as if the buyer had gone to Basle and there taken delivery of the goods. The contract was partly abroad and partly here, and the most material part was here—namely, delivery to the buyer, without which the contract would have been futile. Whether the property in the goods passed at Basle or on delivery in London is immaterial: the act of the respondent is the same in its consequences to the patentee whoever may own the goods. The fact that the

(1) [1896] 1 Ch. 25. (2) [1897] 2 Ch. 322.

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post office is the carrier makes no difference; it would be the same if a messenger (whether he were the agent of the buyer or the seller) sent by the respondent had brought the goods. It is as if a man, standing within a foreign country, blew the goods through a pneumatic tube, or sent them down an inclined plane or shoot into the protected country. The intention is that the goods shall leave the foreign country and be delivered in the protected country, and that intention, coupled with the act done in the foreign country, constitutes an infringement. If it were not so a patentee's rights might always be invaded by taking the precautions in forwarding goods which the respondent took, and which, as appears from the evidence, he always takes in selling patented articles. Where a man standing on shore fired a gun and killed a man at a certain distance at sea with the intention to kill upon the high seas, it was held that the offence was committed upon the high seas, where the death happened, and not where the shot was fired, and so the offender was brought within the Admiralty jurisdiction: *Coombes' Case* (1); and see *Reg.* v. *Keyn.* (2) It is immaterial whether the post office was named as the carrier or not, or at whose risk the goods were carried. The act and the intention complete the offence; the delivery in and transport through England are the natural and direct result; the act of the post office was initiated and caused by the respondent. Importation, or mere possession, or transport in this country is an infringement: *United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.*: (3)

They also referred to *Elmslie* v. *Boursier* (4), *Von Heyden* v. *Neustadt* (5), and *Nobel's Explosives Co.* v. *Jones.* (6)

Asquith Q.C., *Upjohn Q.C.*, and *Roskill*, for the respondent, were not heard.

Nov. 30. LORD HALSBURY L.C. My Lords, in this case it appears to me that the question which is raised admits of a very simple solution.

(1) (1785) 1 Lea. C. C. 388.
(2) (1876) 2 Ex. D. 63.
(3) (1884) 26 Ch. D. 766.
(4) (1869) L. R. 9 Eq. 217.
(5) (1880) 14 Ch. D. 230.
(6) (1881) 17 Ch. D. 721, 741; (1882) 8 App. Cas. 5.

The person against whom this process is asked for is a Swiss subject living in Basle, and it cannot be doubted that unless he has done some act in this country no process could or ought to be issued against him. The allegation upon which the process is sought is that he has used, vended, or exercised in this country a patented article. It is quite certain that he has not done so himself by his own hand; therefore the only question is, whether he has been a party to it in any sense which makes his act one of the acts prohibited by our law in this country.

The facts are very simple. A person wrote from this country to have a certain quantity of a patented article sent by post to him to London. I pass over the intermediate point between the maker and the forwarding agent in Basle, and I will assume, for the purpose of what I have to say, that it was directly sent by post to the buyer by the present respondent. The fact that the sale was completed by delivery cannot be doubted—these were goods sold and delivered. Shortly stated, the question is, where did the delivery take place? I have stated all that in fact took place with reference to the correspondence and the agreement to purchase, and then, inasmuch as it is admitted that the defendant did not himself bring into this country the patented article, I do not understand how it can be possibly put otherwise than that he did it by some one else, according to the perfectly familiar legal maxim. That brings us to the question of who it was that did bring it into this country. I know Mr. Cripps ingeniously suggested that you have nothing to do with the relationship between the parties; the question is, he said, who caused it to be brought? you have nothing to do with what character the bringer filled. My answer to that is, that that is the whole question. What character did the bringer fill: was he the agent of the seller to bring; or, was he the agent of the buyer to bring the article to him? The facts have all been stated, and it appears that the seller sent in pursuance of the order from the buyer to a particular carrier named—I say a particular carrier named, because the post office is but a carrier after all; whatever municipal regulations may be made about the carriage of

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letters, the post office is simply a carrier of parcels like any other carrier. In this particular case, therefore, there is a named carrier who, by the direction of the buyer, receives the goods on behalf of the buyer. It is not necessary that the carrier should have been named. If, according to the ordinary course of delivery, the carrier would be the person who would receive it, that would be just as good, for the purpose of the argument, as if the carrier had been actually named; but we have not to consider that question here, because the carrier is named. Then, for what reason am I to depart from the well-known and recognised principle of law that, under these circumstances, when goods are delivered by the order of the buyer to a named carrier, from that moment the goods vest in the buyer?

It is said, "Oh, you have nothing to do with the question of whether a change of property takes place or not." Why not? You must look behind the rule of law, and see the reason for it. The reason for it is that at that moment, according to the course of carriage, or, here according to the specific directions, there is a delivery to the buyer. That is the reason, and, therefore, if you once assume that the delivery in Basle was a delivery to the buyer, what pretence is there for saying that this was an act done in this country by the seller, when the whole thing, the purchase and the delivery, took place in Switzerland? It seems to me that that is decisive of the question.

My Lords, I am myself, I confess, not impressed by the reference either to *Coombes' Case* (1) or to the hypothetical cases put of the shoot, or the throwing of patented articles over the border between two places close to each other. With reference to *Coombes' Case* (1), I think one may say that there is a confusion of thought between the technical rules of criminal venue, and the question, who is the person doing the act? But, apart from such a comment as that, there is this obvious distinction between all those three cases and this, that the act is completed by the person who is assumed to be the author of the act in each of the cases so propounded; but

(1) 1 Lea. C. C. 388.

here there is this difference, that an intelligent acting agent is interposed between the buyer and the seller, namely the agent who carries away from Switzerland to England. In order to make the analogy complete, you must have some person or another in *Coombes' Case* (1) to help the bullet on to its destination; or, in the other case, to suck it down, as A. L. Smith L.J. puts it, or to put it on some place where the natural course of gravitation would bring it down apart from any other act by any one else. My Lords, I think these are rather fanciful suggestions, because the real substantial question here is, what jurisdiction have we over an act which is done in Switzerland by a Swiss subject, and which, in all that is done, is (it cannot be doubted) an act within the jurisdiction of the Swiss Courts, if there were any patent law applicable to it, but is not within our jurisdiction at all?

My Lords, with reference to the comments of the learned judge, North J., who in the first instance granted the relief that was prayed, the fallacy which I cannot help thinking runs through the whole of his Lordship's reasoning is this. He starts with the assumption that an illegal act is being done, and that according to the familiar legal maxim the defendant is a party to that illegal act, and that, therefore, if you catch him here you may assail him by our process. The answer is that there was no illegal act done upon the hypothesis which I have adopted. It was perfectly lawful for the defendant to sell in Basle. It was perfectly lawful for the defendant to deliver in Basle, and if I am right the sale and delivery both took place outside of our jurisdiction. Of course it is easy to represent, by various and lengthened links of causation, that the present defendant, in one sense, caused it to be brought to this country. So he did. So did the man who manufactured the article in the factory at Basle in one sense. But, then, according to another equally familiar maxim of the law, it is the proximate and not the remote cause that is looked at for legal purposes.

Under these circumstances, my Lords, it seems to me that there is no pretence for this action, and I entirely concur with

(1) 1 Lea. C. C. 388.

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Lindley L.J. and A. L. Smith L.J., that if the facts had been properly ascertained at the time that this writ was allowed to be served out of the jurisdiction, it ought not to have been served, and that if the defendant had thought proper to make an application to set aside the service, that application ought to have been granted. Under these circumstances, I move your Lordships that the judgment be affirmed and the appeal dismissed with costs.

LORD HERSCHELL. My Lords, I am entirely of the same opinion; and if it were not for the difference of opinion which there has been in the Courts below, I should have said that this was a very clear case indeed.

My Lords, the appellants have to make out that the defendant made, used, exercised or vended a patented article in this country. Our patent law does not extend beyond this country. Acts which here would be infringements of the patent are no infringement if they are done in a country which is not within the ambit of the patent.

In this case the only contention is that the defendant used the patented article in this country. My Lords, it is admitted that it was sold and delivered in Switzerland; everything therefore that is necessary to the constitution of a vending took place there. But it is said that although sold abroad, it was after the sale transmitted from abroad to the purchaser in this country, and that whilst being so conveyed in this country there was a using of the patent in this country. Now, my Lords, the defendant himself did not so convey it, nor did any agent on his behalf so convey it. The admitted facts establish that the Post Office authorities and the railway company who in fact conveyed it were acting in so conveying it, not on behalf of the defendant, but on behalf of the purchaser. They were not even carrying the property of the defendant, they were carrying the property of the purchaser. Under these circumstances, it is impossible to say that anything done in this country was done either by the defendant or by an agent of the defendant.

But Mr. Moulton says, What a very slight difference! If

the purchaser had not directed it to be sent by post and the Post Office had been selected by the seller, the defendant, why should that make the case altogether different; what difference can there be because he puts it in the post because the purchaser has selected the post or whether he has himself selected it? In each case it is equally carried by the impulse of the seller to this country and through this country. My Lords, I think the answer is a very simple one. In the one case you could shew that the persons carrying it in this country and delivering it here were agents of the defendant, and that therefore he was responsible for their acts. In the other case you cannot shew that the persons carrying it in this country and delivering it here, were agents of the defendant, and that he is responsible for their acts. You may say that that is a very slight difference, but it is a vital difference, for in the one case you can establish agency and in the other case you cannot.

But, my Lords, in my opinion the difference goes deeper than that. If the sale had not been completed under the contract by delivery in Basle, but if the goods were according to the order to be delivered by the seller in England, the sale would not have been constituted and complete in Switzerland. Until the goods had been delivered in London there would have been no sale. The property in the goods would not have passed to the purchaser, they would still have been the vendor's goods, and the vendor could not have demanded the price of them from the purchaser, because the sale was not complete. In that case I apprehend it would have been impossible for him to get out of the charge, whatever process you could use against him, of vending in England, when there was no completed sale constituted except by reason of an act done by him through his agents in England. But I do not think his liability would have arisen from the fact that he was using the patented article in England by having it carried from one place to another. If that be so, there is an absolutely vital distinction between the case put and the present case.

My Lords, I only desire to add this: supposing that a case of vending could not be established, that no part of the sale was

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constituted in this country, and that the only charge possible were a charge of using, I do not intend to express any opinion, but I desire distinctly to reserve my opinion whether the mere transport from place to place in this country of a patented article would necessarily be a using in this country. There are some very pertinent observations on the subject by James L.J. in the *Nobel's Explosives Co.* v. *Jones* (1); in that case he pointed out that it might be that the warehouse keeper who warehoused the goods could be said to use the patented article, because the very object of the patent was to make the storing and carriage of that particular article safe (it was a form of dynamite), and therefore the warehouse keeper who stored it might be said to be using the patent, not merely because he had the patented article in his warehouse, but because he had got the advantage, having it in his warehouse, of storing there an article which he could not have stored safely but for its patented condition. That, according to James L.J.'s suggestion, might be using the patented article. In the same way there are other cases in which the article is, when applied in a particular way, of itself serving the purpose for which it is patented. Those are cases in which it may be that the mere possession, transport, or warehousing of the patented article may amount to a using of it; but it by no means follows that in a case where the person transporting it or warehousing it gets no advantage out of the patent—that is to say, where it can be no more easily, and no more safely, and no more advantageously carried, warehoused, or stored, than if the article were not a patented one, but were an article entirely outside the patent—it by no means follows that the transporting from place to place or otherwise dealing with the patented article in that kind of way would constitute a using. My Lords, I do not desire to decide that point now, but I wish to draw attention to that distinction, because Mr. Moulton strongly urged, and indeed it seems to have been rather assumed in the Court below, that although the sale was entirely outside the kingdom, if the act of transport within the United Kingdom could be brought home to the defendant, that would make out a use in the United Kingdom. If such a case should

(1) 17 Ch. D. 721, 741; 8 App. Cas. 5.

arise I desire to reserve complete freedom of action with regard to that point.

My Lords, I should like to add one word: with all that my noble and learned friend the Lord Chancellor said about *Coombes' Case* (1) and its application to this case, I entirely agree.

LORD MACNAGHTEN, LORD MORRIS, and LORD SHAND concurred.

LORD DAVEY. My Lords, I entirely concur in the conclusion your Lordships have arrived at, and in the reasons for that conclusion which have been given by A. L. Smith L.J. in the Court of Appeal and which have been given by your Lordships. If the appellants could have made out that the goods were contracted to be and were delivered in London, I think as at present advised that that would have been a vending in this country within the meaning of the Patent Act. In my opinion there was no delivery in London, and nothing was done by the respondent in this country. Like my noble and learned friend opposite (Lord Herschell), I desire to express no opinion upon the nice question which might have arisen under other circumstances, but which in my opinion does not arise in the circumstances of this case.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, November 30, 1897.

Solicitors for appellants: *J. H. & J. Y. Johnson.*
Solicitors for respondent: *Ward, Perks & McKay.*

(1) 1 Lea. C. C. 388.

[HOUSE OF LORDS.]

H. L. (E.) 1897 Dec. 3.

THE DARTFORD RURAL DISTRICT COUNCIL (PROSECUTING IN THE NAME OF THE QUEEN) . . . . . } APPELLANTS;

AND

THE BEXLEY HEATH RAILWAY COMPANY . . . . . } RESPONDENTS.

Railway Company—Footpath—Bridge—Mandamus—Railways Clauses Consolidation Act 1845 (*c.* 20) *ss.* 46, 49, 50, 61.

Sect. 46 of the Railways Clauses Consolidation Act 1845 does not impose upon a railway company, whose line crosses a public footpath, the obligation of carrying the footpath over the railway or the railway over the footpath by means of a bridge.

The decision of the Court of Appeal, [1896] 2 Q. B. 74, affirmed.

THE respondent company were authorized by the Bexley Heath Railway Act 1883 and subsequent Acts to construct a railway which crossed a footpath in a parish within the district of the appellants. The railway was carried across the footpath on an embankment twenty feet high, and persons using the footpath must ascend the embankment by steps, cross the railway, and descend the other side by steps. The special Acts of the company contained no provision as to the mode of crossing the footpath.

Upon the application of the appellants the Queen's Bench Division (Day and Lawrence JJ.) made absolute a rule for a mandamus commanding the company to carry their railway over the footpath, or the footpath over the railway, by means of a bridge. The Court of Appeal (Lord Esher M.R., A. L. Smith and Rigby L.JJ.) discharged that order with costs. (1)

Sect. 46 of the Railways Clauses Consolidation Act 1845 is as follows: "If the line of the railway cross any turnpike road or public highway, then (except where otherwise provided by the special Act) either such road shall be carried over the railway,

(1) [1896] 2 Q. B. 74.

or the railway shall be carried over such road, by means of a bridge, of the height and width and with the ascent or descent by this or the special Act in that behalf provided; and such bridge, with the immediate approaches and all other necessary works connected therewith, shall be executed and at all times thereafter maintained at the expense of the company: Provided always that, with the consent of two or more justices in petty sessions as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."

December 2, 3. *Macmorran Q.C.* and *G. F. Hohler* for the appellants. The true construction of s. 46 of the Railways Clauses Consolidation Act 1845, taken together with the group of sections following it, is to impose upon a railway company crossing a footpath (where no provision is made by the special Act) the duty of either carrying the footpath over the railway or carrying the railway over the footpath by means of a bridge. Sect. 46 applies in terms to a railway crossing "any turnpike road or public highway." "Public highway" includes footpath. It is true that ss. 49, 50, which prescribe the dimensions of the bridges, apparently apply only to the crossing of roads, and not to the crossing of footpaths. But the proviso at the end of s. 46 clearly implies that a railway cannot cross a footpath on the level without the consent of the justices. And ss. 59 and 60, which empower justices to authorize the company "to carry the railway across any highway other than a public carriage road on the level," must apply to footpaths and bridle-roads: otherwise the dispensing power has no application at all. This being so, as the dimensions of bridges to be made over footpaths are not prescribed by the general Act, such bridges must—where as here the special Act makes no provision—be sufficient for the purpose. Unless this construction be adopted the proviso in s. 46 has no meaning whatever: it would be unreasonable unless an obligation to make the bridge is implied. The intention of the Legislature was that where the special Act makes no provision for footpaths, the general Act shall protect the public from the danger of a level crossing by requiring a bridge in all

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cases except where the justices exercise the dispensing power conferred on them.

Farwell Q.C. and *Edward Boyle* for the respondents were not heard.

LORD HALSBURY L.C. My Lords, I regret, with A. L. Smith L.J., that we do not know the grounds on which this order was made by the Queen's Bench Division. I confess for myself I do not understand why the mandamus was issued. It is not the fault of the learned counsel for the appellants, who have both argued very ably and earnestly in favour of their proposition, but I am bound to say I do not yet understand where the obligation to build the bridge comes from. I cannot find it in the Act of Parliament. All I can conjecture to be the reasoning is this: finding that the Act of Parliament (8 Vict. c. 20) certainly does not in terms contain any such obligation, you find in clause 46 a proviso which, unless there is such an obligation there, would, it is said, be an unreasonable proviso to put into the Act, because the proviso can only operate where there is such an obligation. My Lords, I think that is stating fairly the argument that has been presented to your Lordships. But that argument assumes that the statute is the final end of legislation; and that is exactly what it is not, because the statute in its terms assumes that special Acts will be passed from time to time containing provisions of their own, and if there are some such provisions, as has been pointed out by the learned counsel, then the proviso has its natural and just operation. The whole argument is that you must try the statute by itself and the proviso by itself, and assume that there must be an obligation (which, certainly, in terms, is not there) because, as they say, if you were to construe the whole statute there is the proviso, and it must operate on something, and, inasmuch as if the obligation is not there the proviso operates upon nothing, it is an unreasonable course of legislation of which you cannot assume the Legislature would have been guilty.

My Lords, it seems to me that I have already given the only answer which can be given, and it seems to be a complete

answer—namely, that this is not the end of the legislation according to the statute itself; on the contrary, both by the form of the preamble and by the title of the statute it purports to be an Act of Parliament which contains within itself all such general provisions as are applicable to railways, and which are to be included, or are usually included, in every special Act. That appears to me to be the whole point; and although your Lordships have been engaged for a considerable period of time in the argument over this matter, it seems to resolve itself into this. I asked the question which each of the learned Lord Justices asked in turn without getting an answer, Where am I to find, either in this special Act or in this general Act, the obligation to build a bridge over a footpath? I cannot find it. Except in the proviso, with which I have already dealt, there is no such obligation to be found there; and there being no such obligation to be found, no mandamus can be issued to command the railway company to do that which they are not bound to do under these Acts of Parliament.

My Lords, I do not go into the sections that prescribe the heights and widths and gradients and so on of bridges which are to be built in a particular way, because it cannot be contended—I do not think even the learned counsel for the appellants have argued—that these provisions apply to bridges over footpaths; and if they do not apply to bridges over a footpath, then it appears to me that the absurdity is too manifest to require further exposition—that a bridge over a footway is to be included in a provision as to bridges which applies to turnpikes and carriage-roads, and is not applicable to footpaths at all.

Under these circumstances, I move your Lordships that the order appealed from be affirmed and the appeal dismissed with costs.

LORD WATSON. My Lords, I think it is very clear that the Court has no jurisdiction whatever to make the order which the appellants crave. The 46th section of the Railways Clauses Act 1845 deals with the erection of bridges in two sets of circumstances; it deals with bridges, in the first place,

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the height, width, and dimensions of which are prescribed by the Act itself; and it also deals, in the second place, with bridges, the height, width, and dimensions of which may at a future time be prescribed by a special Act of a railway company. The special Act of the railway company who are the defendants in this case does not make any such prescription, and therefore the case against them is necessarily based upon the terms of s. 46 of the Act of 1845.

Now, my Lords, from the beginning to the end of that clause there are no words which impose upon a railway company any obligation except to erect bridges of the height, width, and dimensions specified either in that Act or in the special Act, and the Court can only exercise the right of enforcing that obligation. And, seeing that in this case no dimensions for footbridges have been prescribed in the special Act, your Lordships have no jurisdiction to make the order which the appellants crave.

LORD HERSCHELL. My Lords, I am of the same opinion. I think the fallacy which runs through the argument of the learned counsel for the appellants, who both put their case very clearly and forcibly before the House, arises from this, that the fact is overlooked that the statute of 1845 has not of itself any operation in respect of any road whatsoever, whether a carriage-road, a footpath or a turnpike road; it can only be brought into effect by some rights being given and corresponding obligations created by a special Act with which it is incorporated. When that special Act is passed then within the area which it covers those sections and the provisions of the special Act together come into operation. That is the scheme of legislation.

My Lords, certain provisions have been inserted in these clauses which it is assumed will meet the general case and will save the trouble of specific legislation in respect of them. Being a general rule it may of course be departed from in a particular case if the special legislation so provides. In the absence of such special legislation they are brought into operation by the special Act. But the statute 8 Vict. c. 20 does not profess to provide for every case. It recognises that there may

be cases—perhaps many cases—in which the matter is better left to be dealt with in a special Act, and in my opinion the case of bridges over footways is one of those cases. It is not an oversight, it is not clumsy legislation. It is, as far as I can see, the design of the Legislature that, whereas in the case of carriage-roads or turnpike roads a general rule could be laid down in the general Act, in the case of footways a general rule cannot be laid down in the general Act, but provisions in respect of the matter must be left to be dealt with by the special Act. But the legislation in s. 46 is so framed that when you make general provision for bridges over and under footways in respect of a particular railway by the special Act, then s. 46 having the general word "highway" applies to all those footways just as much as if the provision in respect of them had been found in the general Act instead of being inserted in the special Act. That makes the whole of the legislation perfectly consistent and perfectly intelligible, and gets rid of all the suggested difficulties that have been pressed upon your Lordships by the learned counsel for the appellants.

For these reasons I think the judgment should be affirmed.

LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and LORD DAVEY concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 3, 1897.

Solicitors for appellants: *Pyke & Parrott, for J. & J. C. Hayward, Dartford.*

Solicitors for respondents: *Dollman & Pritchard.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1897 Nov. 16.

THE CALEDONIAN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

MULHOLLAND OR WARWICK . . . RESPONDENT.

Negligence—Defective Railway Wagons—Breach of Duty—Liability of Railway Company for their own defective Wagons while in use by another Railway Company—Relevancy.

Wagons belonging to the Caledonian Railway Company were filled with coal from pits on that railway company's system, and delivered to the Glasgow and South Western Railway Company at Dumfries Station, who had an agreement with the Gas Commissioners of Dumfries to haul the coal from the station to the gasworks. The station and the gasworks were connected by the Gas Commissioners' tramway line running along a public street. The Glasgow and South Western supplied the men and horses to haul the wagons, and once the wagons left the Caledonian Company's system they were not under their control. In conducting the wagons into the gasworks, two wagons at a time were taken along the tramway; but owing to a descent and ascent, one of the wagons was as usual uncoupled at the top of the descent, and the other taken on at a sharp trot to rush the ascent. While this was being done an obstruction got in the way, and the first wagon had to be pulled up; but the brake of the second wagon refused to act, and the husband of the respondent, who was in the employ of the Glasgow and South Western Railway Company, was caught between the two wagons and killed. The respondent raised this action against both railway companies, and the question was whether there was a relevant case made against the Caledonian Railway Company. There was no averment as to the state of the wagons before they left the Caledonian Railway Company's system:—

Held, reversing the decision of the Second Division of the Court of Session, that the respondent's averments did not shew that there was any duty cast on the Caledonian Railway Company in respect to any one using the wagons on behalf of the Glasgow and South Western Railway Company to take care that the wagons were in proper order after the coal had been delivered at Dumfries Station; and therefore the Caledonian Railway Company must be dismissed from the action.

Heaven v. *Pender*, (1883) 11 Q. B. D. 503, distinguished.

APPEAL against a judgment of the Second Division of the Court of Session, Scotland (1), in an action for damages raised

(1) 24 R. 429; 34 Sco. L. R. 317.

in the Sheriff Court of Dumfries by the respondent Sarah Mulholland or Warwick, widow of the late Andrew Warwick, who was in the employment of the Glasgow and South Western Railway Company, against that company and the appellants the Caledonian Railway Company, which action was appealed by the respondent to the Second Division of the Court of Session for trial by jury: 6 Geo. 4, c. 120, s. 40, and 31 & 32 Vict. c. 100, s. 73.

In the action the respondent concluded for damages in respect of the death of Andrew Warwick, which was caused by an accident which occurred at Dumfries on October 22, 1895. The Second Division of the Court of Session appointed issues to be lodged for the trial of the cause, and the appellants and respondent were heard on the question of relevancy. No argument was submitted to the Court on behalf of the Glasgow and South Western Railway Company. The Gas Commissioners gave the respondent a donation of 50*l*.

The respondent in her pleadings averred substantially as follows: That the premises of the Dumfries Gas Commissioners were situated 400 yards distant from the goods yard of the Glasgow and South Western Railway, and were connected therewith by a line of rails belonging to the commissioners, laid along the public street: That the Glasgow and South Western Railway had contracted with the Gas Commissioners for the haulage to the premises of the latter of coal consigned to them, and arriving at Dumfries by the lines of either the Glasgow and South Western Railway or the Caledonian Railway: That the precise terms of the contract were unknown to the respondent: That the respondent founded on certain letters: and that if the arrangement contained in these letters was no longer in force, it would be found to have been superseded by an arrangement made between the two railway companies, to which the Gas Commissioners were not a party and the terms and effect of which are unknown to the pursuer; and pursuer founds upon said arrangement as coming in the place of said contract. To this the Glasgow and South Western Company made answer: "There is no arrangement between the two railway companies for the

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transfer of coal coming by the Caledonian line from that line to theirs, which takes place in the ordinary course of railway traffic, and on delivery of the coal to the commissioners at the point where their tramway commences, the contract of carriage which is between the coal company and the railway company, to whom they deliver the coal for conveyance, is at an end. It is not until after the delivery takes place that the contract of haulage between the commissioners and the South Western Railway Company comes into operation, and the said company are in no way responsible for the condition of the commissioners' tramway line, nor of the fitness of the wagons used thereon, this contract being simply to horse all traffic for the commissioners from the said point of delivery into the gasworks, and to haul back the empty wagons to said point." The respondent further averred: That the mode of haulage was as follows:—Two wagons coupled together with a man in charge of each, and drawn by three horses, each attended by a driver, were taken along the line at one time (Cond. art. 5): That the line of the rails leading along the street was level for about half the distance, then it dipped down to within a few yards of the gate of the gasworks, and thereafter there was a sharp ascent up through the gate and round a corner into the gasworks: That when the two wagons were brought to the place where the dip commenced they were uncoupled; the first was drawn by the horses down the descent, and then at a quick trot up through the gate into the gasworks; the other wagon followed more slowly by its own weight, and was gradually brought to a stand where the descent ended, the horses returning for it after the first wagon had been left in the gasworks (Cond. art. 7): That on October 22, 1895, Warwick, who was a carter in the employ of the Glasgow and South Western Railway Company, was ordered by the foreman of the goods yard of the company to assist in the haulage of wagons of coal from the goods yard to the gasworks (Cond. art. 3). That he was put in charge of the first wagon, and when the two wagons arrived at the descent before alluded to they were uncoupled, and the first was drawn down the descent by the horses and up through the gate into the gasworks at a trot: That as they

turned the corner at the gate those in charge of the horses found that the line was obstructed, and they pulled up suddenly by making the horses swing round from the line: That in the meantime the second wagon descended by its own weight, and a man named Burns, in charge of the second wagon, seeing that the first wagon had come to a stand, attempted to stop the second wagon by applying the brake, but the brake was defective and would not work: And that because of this the second wagon dashed into the first and Warwick was killed (Cond. arts. 9, 10, 11, 12).

Article 13 of the condescendence was as follows: "The said accident was caused by the negligence of the defenders. In the conduct of coal traffic it is the usual custom of the Caledonian Railway Company and other railway companies, for convenience in the loading and unloading of coal, to send their wagons or permit them to be taken beyond their own lines on to the lines of other railway companies, and on to lyes or private lines or sidings belonging to consignors or consignees of coal, without any express contract or charge being made in respect of such use of the wagons. It is for the advantage of the railway companies to give this accommodation, as otherwise the trouble and expense of transhipping the coal from one wagon to another would be so great as to prejudice the trade of any railway company which refused it. In these circumstances, it is the duty and is the practice of the Caledonian Railway Company and other railway companies to take care that wagons of which such use is given are in proper working order, with a view to the safety of those who may have occasion to use and handle them in the loading, unloading, and delivery of the coals. As regards the coal conveyed by the defenders the Caledonian Railway Company, for the Dumfries Gas Commissioners as consignees, it is and for many years has been the regular practice for the said defenders to give the use of the wagons belonging to them, in which coal has been carried from coal pits on their system of railway to Dumfries Station, for the conveyance of the coal from the station to the gasworks, without necessity for any transhipment, the haulage being performed by the defenders the

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Glasgow and South Western Railway Company, under their contract before mentioned, and in pursuance of this practice, the defenders the Caledonian Railway Company gave use of the foresaid two wagons . . . . Nos. . . . . on the occasion in question. It was accordingly their duty to take care that the said two wagons were in proper condition for use, and in particular that the brakes thereof were of proper construction and in good working order; but they negligently failed to perform this duty, the brakes of both wagons, and in particular of the wagon in charge of Burns, having been unserviceable and out of proper repair, as set forth in art. 12. Explained, that with a view to handing over said wagons for such haulage, it is the practice, by arrangement between the two defenders, for coals coming by the Caledonian Company's line to be booked through for delivery, not at their own station, but at the station of the Glasgow and South Western Company at Dumfries; and not merely at the station, but at the very point beside their gate at Leafield Road where the haulage along the tramway is to commence. The greater number of wagons so hauled are Caledonian wagons, as most of the Gas Commissioners' coals come by their line." That it was the duty of the Glasgow and South Western Company before taking wagons belonging to the other defenders along the tramway line to the gasworks to inspect such wagons (Cond. art. 14). To arts. 13 and 14 the appellants answered: "These defenders were not employed to haul the said wagons along the street to the Dumfries gasworks, and they were not paid therefor, nor for the use of their wagons while this was being done. They were not aware that the said wagons were to be hauled along the street in the manner described after they were delivered to the Glasgow and South Western Company. They had completed their contracts with the coal companies when they delivered the said wagons to the Glasgow and South Western Railway Company, which was done at these defenders' goods yard at Dumfries." The 1st and 2nd pleas in law for the appellants were that the averments of the respondent upon record were not relevant or sufficient to infer liability against them, and that the action so far as against them should be dismissed. And their 5th plea was:

"The wagons condescended on having been in the possession and under the control of the other defenders, the Glasgow and South Western Railway Company, when the accident occurred, they are alone responsible for the sufficiency of the said wagons, and these defenders should be assoilzied." The Glasgow and South Western Railway Company's 7th plea in law was: "The said defenders not being owners of the wagons in question, and their contract in relation thereto being merely for haulages and not for carriage as common carriers, the wagons being the property of the Caledonian Railway Company, the Caledonian Railway Company and the Gas Commissioners are responsible for their condition, and the South Western Company are not liable for any accident occurring through any defect in them."

The Second Division (Lord Trayner dissenting), by interlocutor dated January 29, 1897, held that the action was relevantly laid against the appellants; and accordingly approved issues for the trial of the cause against both the appellants and the Glasgow and South Western Railway Company.

Nov. 15, 16. *A. Graham Murray, L.A.* (with him *E. B. Nicolson*, of the Scottish Bar), for the appellants. The Court of Session should not have allowed the issues against the appellants. Their liability ceased when the wagons left their line, and the accident happened when work was being performed on a set of rails running through a street under a contract between the Dumfries Gasworks and the Glasgow and South Western Railway Company, after the appellants had delivered the coal at Dumfries, and the wagons were out of their control. Moreover, the respondent does not aver any contract with the appellants. The only substantial averment against the appellants was that the wagons were theirs, and that they were not in proper working order. There was no averment that the wagons were not in proper working order before they left the appellants' system. It was quite consistent with that, that they were at that period in good condition. The respondent's contention is that it was the appellants' duty at every and all times to see that the wagons were in a proper condition for use for

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all purposes. That cannot stand. There was no duty on the appellants to see that the wagons left their system in perfect order. Lord Young granted issues against the appellants to see whether there was a contract between them and the Glasgow and South Western Railway Company upon which the coals and wagons were being taken from the station to the gasworks. The learned judge said: "The Glasgow and South Western Railway Company affirm that they had employment only to do the haulage—to furnish the horses and the men—and the respondent says that the one or the other must be responsible to her for the condition in which the wagons were. I say we cannot decide upon the liability of the Caledonian Company, or non-liability of the Caledonian Company, without evidence as to the contract. Primâ facie it seems improbable, to the extent of being absurd, to suppose that the Caledonian Company, from mere love and favour either to the coal owners, or to the Glasgow and South Western Railway Company, or to the Gas Company in Dumfries, are to supply their wagons practically for nothing to carry coal along the 400 yards of tramway on the street, and to be brought back again. The coals cannot be carried to the gasworks without wagons as well as haulage, and mercantile companies and trading companies—and the Caledonian Railway Company and the Glasgow and South Western Railway Company are just such, the one supplying the wagons and the other the haulage—will do nothing for love, favour, and affection for anybody, but will only act in the ordinary course of their business for a pecuniary consideration. Whether the payment to the Caledonian Company is made in their general charge for conveyance of coals or otherwise, or whether it is a mere consideration that on the whole it is profitable for them to furnish the wagons for this, they are paid for it. . . ." The respondent's pleadings contain no averment of a contract. But even if there had been such a contract, what is that to the respondent? She is not entitled to found upon it, for her pleadings do not allege that any relation existed between her deceased husband and the appellants: *Campbell* v. *Kennedy* (1); *Winterbottom* v. *Wright*. (2)

(1) (1864) 3 M. 121.

(2) (1842) 10 M. & W. 109.

Further, the respondent relied upon *Heaven* v. *Pender* (1); but that was a very different case, and indeed the principle laid down by Brett M.R. (cited in the head-note to that case) was dissented from by Cotton L.J. (2) *Langridge* v. *Levy* (3) has been followed as far as it goes; but there is a flood of opinion against its going further.

Cyril Dodd, Q.C., and *C. E. Allan*, for the respondent. The coal was usually delivered in this way, and the appellants were aware of the manner in which the Glasgow and South Western Railway Company were going to use the wagons, and therefore it was their duty before sending the wagons out to see that they were in proper condition. It is the general duty of a railway company who lend their wagons to see that they are reasonably fit to perform the journey—that is, that these wagons were reasonably fit to go down this descent: *Robinson* v. *Watson* (4); *Richardson* v. *Great Eastern Ry. Co.* (5) And that was a duty which entitled anybody in the employment of the Glasgow and South Western Railway Company who was injured while they were being used by that railway company to sue the Caledonian Company if there was a breach of that duty. The respondent says that there was an invitation here either express or in course of business: *Elliott* v. *Hall*. (6) This was not the case of a gratuitous loan. The appellants were interested in the conveyance of the coal to the gasworks; and part of the contract was that the wagons should be used for that purpose: therefore the appellants' duty did not cease at Dumfries Station. If one invite another on to his premises or property, he must not lay a trap for him. Here the invitation came from the appellants.

[LORD HERSCHELL mentioned *Gautret* v. *Egerton* (7), where *Indermaur* v. *Dames* (8) was cited, and distinguished as a case of trap.]

The giving the wagons to the Glasgow and South Western

(1) 11 Q. B. D. 503.
(2) 11 Q. B. D. at pp. 516–7.
(3) (1837–8) 2 M. & W. 519; 4 M. & W. 337.
(4) (1892) 20 R. 144.
(5) (1876) 1 C. P. D. 342.
(6) (1885) 15 Q. B. D. 315.
(7) (1867) L. R. 2 C. P. 371, p. 373.
(8) (1866) L. R. 1 C. P. 274.

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Railway Company gave them a right of action, and their servant stands in the same position. *Heaven* v. *Pender* (1) is practically identical.

[They also mentioned *Le Lievre* v. *Gould* (2), *Mowbray* v. *Merryweather* (3), and *Smith* v. *Steele.* (4)]

LORD HERSCHELL. My Lords, the question which arises upon this appeal is whether upon this record there is a case established as against the Caledonian Railway Company. The action was brought in respect of an accident that happened to a servant of the Glasgow and South Western Company by which he lost his life, the action being brought by his widow to recover damages in respect of the loss she had thereby sustained. Not only are the Caledonian Railway Company sued, but the Glasgow and South Western Railway Company also; and as against the Glasgow and South Western Company it is not contested that a relevant case is shewn upon the pleadings.

Now, my Lords, the facts that appear upon this record are these. The Caledonian Railway Company carried certain coals to the Dumfries Station, and as soon as those coals arrived in the wagons at the Dumfries Station every obligation undertaken by the Caledonian Company in respect of them was at an end. That was the place of delivery, and the parties might, if they had pleased, have taken delivery of them there; they might have emptied the wagons of their coals at the place where the Caledonian engine left them; and the Caledonian Company, of course, would have had nothing to say to their doing so. But for their own purposes and their own convenience the Glasgow and South Western Company made an arrangement with the Dumfries Gas Commissioners by which they were to haul the coals from the place of delivery under the contract with the Caledonian Company, namely, the station, to the premises of the Gas Commissioners, which were about 400 yards, or something like a quarter of a mile, distant. Between the place where the Caledonian Company left these

(1) 11 Q. B. D. 503.
(2) [1893] 1 Q. B. p. 497.
(3) [1895] 2 Q. B. 640.
(4) (1875) L. R. 10 Q. B. 125.

trucks of coals and the premises of the Gas Commissioners there was a tramway passing along the public streets. The trucks were hauled two at a time along this tramway to the Gas Commissioners' premises. Whilst two trucks were being so hauled, it is alleged that the husband of the plaintiff lost his life by reason of some imperfection in the breaks connected with those trucks. It became necessary in passing along this tramway to check the motion of the trucks, and the motion of these trucks was not checked rapidly enough to prevent the one coming against the other so that the plaintiff's husband was crushed.

I think I have stated all the facts which appear upon the record, except that perhaps I ought to add that it is averred that it is by the permission, sanction, and consent of the Caledonian Company that the Glasgow and South Western Company, or the Gas Commissioners, do not take delivery of the coals out of the wagons at the station, but haul those wagons on so that the coals may be discharged direct into the premises of the Gas Commissioners.

My Lords, the question is whether these facts establish any duty on the part of the Caledonian Company, a breach of which has led to the damage complained of by the plaintiff. It is said that the duty is this—that the Caledonian Railway Company, inasmuch as they knew how the Glasgow and South Western Company were going to use these wagons, were bound when they handed them over to examine them in order to see that they were in a proper condition, and if they had examined them they would have seen that they were not in a proper condition; they were, therefore, handing over wagons which they had not so examined, and which were not in a proper condition for use by the Glasgow and South Western Company; and that was a duty which entitled any person in the employment of the Glasgow and South Western Company, who might be injured whilst they were being used by the Glasgow and South Western Company, to sue the Caledonian Railway Company if there was a breach of it.

My Lords, I do not think any such duty has been established by the arguments of either of the learned counsel for the

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respondent. The Caledonian Company had performed all their obligations when they handed these wagons over; and I think it would be altogether unreasonable to maintain that there was a duty on the part of the Caledonian Company, after they had fulfilled their contract of carriage, to examine these wagons and see that the breaks connected with them were in a fit condition for a subsequent journey on which for their purposes the Glasgow and South Western Company were going to haul them into the premises of the Gas Commissioners. With that haulage the Caledonian Railway Company had nothing to do—their contract was at an end; it was a new journey along an entirely different railway, and with the incidents of that journey the Caledonian Railway Company were altogether unconnected.

Can it be said that, because they handed these wagons over under the circumstances I have mentioned to the Glasgow and South Western Railway Company, they became liable to any workman of the Glasgow and South Western Railway Company who might be injured whilst the Glasgow and South Western Railway Company were using them on what, for this purpose, I may call their line and their purposes, because they were not when they were handed over to the Glasgow and South Western Railway Company in a condition suitable for use on that journey? My Lords, it seems to me impossible to maintain that there was any such duty owed by the Caledonian Company to persons in the employment of the Glasgow and South Western Company. I think, if we were to hold that such an obligation existed, some very strange consequences would ensue—consequences so unreasonable, it seems to me, as to shew that the duty cannot exist.

Reliance was placed upon certain authorities to which your Lordships' attention was called, and particularly upon the case of *Heaven* v. *Pender*. (1) That case really seems to me totally different. There some apparatus of a dock company was being used for what I may call dock purposes. It was part of the facilities which the dock afforded, just as they did by their cranes, their warehouses, or any other appliances.

(1) 11 Q. B. D. 503.

to the vessels that came to use their docks. This particular appliance was in such a condition that a person going upon it, trusting, as he would have a right to trust, that he might go upon it safely because it would bear his weight, was led into what has been called a trap by which he sustained an injury. He was there upon the invitation of the dock company; and, although it is true that this staging was used for painting a ship, it was part of the appliances supplied by the dock company for purposes connected with the carrying on of their business. It was one of the facilities given by which they induced vessels to use their docks that they did supply these appliances. It was said that they had invited the plaintiff to come upon that staging, and that they were responsible if the man so invited was led into the trap by means of which he was injured. That was the case of *Heaven* v. *Pender*. (1)

Now, my Lords, I am quite unable to see that that case has any application to the present case at all. This wagon, at the time it was being used, was being used on a new journey initiated by the Glasgow and South Western Company for their purposes, and there was nothing in it which can be said to be comparable to a trap created by or permitted to exist by the Caledonian Company into which they invited and led the deceased man to come. Therefore the case of *Heaven* v. *Pender* (1) seems to me entirely without application to the present case; and, as I have said, I am quite unable to see any duty resting upon the Caledonian Company to the deceased man a breach of which has caused the loss of his life, and consequently a right of action in the plaintiff.

My Lords, in the Court of Session there was a difference of opinion between the learned judges. The majority were of opinion that this statement, these condescendences, did shew that there was a case, and judgment was given accordingly by Lord Young, in which the Lord Justice Clerk concurred. Now, with all respect, I think the judgment of Lord Young is founded upon the supposition that it was enough if there might have been a contract under which the Caledonian Company were under some obligation during the haulage of these wagons,

(1) 11 Q. B. D. 503.

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and that, there being an uncertainty whether there was such a contract or not, the case ought to go to trial to see whether there was such a contract, because he says it is absurd to suppose that they were led by favour and affection to let their wagons be used, and therefore they must have been used under some contract. That, I think, is what was in the learned judge's mind—it is only in that sense that I can interpret his language and appreciate the view he has taken. But I think it is for the plaintiff to make out a relevant case. If it rests upon a contract, though we may not know what has passed between the parties, and it may be a matter of speculation, still if a contract is necessary to a relevant case, then a contract must be alleged; and of course it may be that the plaintiff will not succeed in proving it. But in the present case I can find nothing alleged in the whole of this claim to shew that any responsibility rested upon the Caledonian Railway Company after they had delivered the goods at the station, or that they had anything to do, or any sort of connection, with the haulage which took place afterwards from the station to the works of the Gas Commissioners.

My Lords, for these reasons I think the judgment must be reversed. I may add that my noble and learned friend the Lord Chancellor (Lord Halsbury), who heard the whole of the argument of the leading counsel for the respondent, desires me to say that he takes entirely the same view.

I move your Lordships that the interlocutor appealed from be reversed, and the action as against the appellants dismissed.

LORD MACNAGHTEN. I quite agree.

LORD MORRIS. I am of the same opinion.

LORD SHAND. My Lords, the Caledonian Railway Company, one of the two defenders in this case, have maintained that they are not bound to submit to a trial upon this claim, and in arrest of the proceedings have maintained that the pursuers have made no statement relevant in law to infer the liability which is alleged against them. I agree with your Lordships

in holding that that plea is well founded, and that the action, so far as the Caledonian Railway Company is concerned, ought to be dismissed.

My Lords, in the pursuer's statement it is not alleged that any relation whatever subsisted between her deceased husband and the appellants, the Caledonian Railway Company. There was no such relation as employer or employed, or of any other kind. The deceased husband of the pursuer was a servant, not of the Caledonian Railway Company, but of the Glasgow and South Western Railway Company, in whose employment he was. He was acting under their orders in the proceeding which led to this accident. So far as the Caledonian Company were concerned, he was an outsider or a stranger to them in every sense of the term.

My Lords, it appears from the pursuer's statement that the only part which the Caledonian Company took in reference to the use of these wagons was this: they, under a contract of carriage which they had entered into, carried the coal in their wagons from its place of departure (I do not know that it is very distinctly stated where that was) to its place of destination, and that place of destination was Dumfries. The moment the wagons arrived, hauled by the Caledonian Company under that contract of carriage, at the station at Dumfries, and were placed in the station of the Glasgow and South Western Company there, the Caledonian Company had done with their contract. It appears, however, that a separate arrangement was made for a subsequent journey. I call it a journey, although it was short in distance; it might have been for twenty or thirty miles, but it so happens that it was not so long, but was only a distance of 400 yards through the streets of Dumfries to the works of the Dumfries Gas Commissioners. But for this separate journey, as I call it, there was a separate undertaking between two different parties: I mean between the Dumfries Gas Commissioners, to whom the coals belonged and to whose premises they were carried, and the Glasgow and South Western Company. It was in the execution of that contract of carriage between the Gas Commissioners and the Glasgow and South Western Company

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that this unfortunate man, an employee of the Glasgow and South Western Company, met with the accident which led to the action. The only connection, as it appears to me, which the Caledonian Company had with this matter, after delivering the wagons at the station, was that they were the owners of the wagons. Beyond that I can see nothing which can be suggested to fix responsibility upon them.

It is true, as has been pointed out and pressed upon your Lordships' consideration, that in art. 13 of the pursuers' statement it is averred that "as regards the coal conveyed by the defenders, the Caledonian Railway Company, for the Dumfries Gas Commissioners as consignees" (that is, coal carried by them to Dumfries), "it is, and for many years has been, the regular practice for the said defenders to give the use of the wagons belonging to them, in which coal has been carried from coal-pits on their system of railway to Dumfries Station, for the conveyance of the coal from the station to the gasworks without necessity for any transshipment." That simply means that, there being an arrangement that the Glasgow and South Western Company are to carry the coals on from the Dumfries Station to the Gas Commissioners' premises, the Caledonian Company, in order to avoid the inconvenience of the transshipment of the coal, allowed or gave the use of their wagons to the Glasgow and South Western Company.

What is said to follow from that is stated in the preceding sentence—a sentence which, logically speaking, ought to follow what I have now read. "In these circumstances, it is the duty, and is the practice, of the Caledonian Railway Company and other railway companies to take care that wagons of which such use is given are in proper working order, with a view to the safety of those who may have occasion to use and handle them in the loading, unloading, and delivery of the coal." Now, my Lords, it is all very well to aver that to be a duty, but a pursuer in circumstances such as these is bound not merely to say that there is a duty, but to give the grounds from which that legal duty is to be inferred, and the only ground upon which that duty is said to arise or to be inferred is set forth in the clause I have already read, which states that the Caledo-

nian Company have been in the habit of giving the use of the wagons. It is very clear, in my opinion, that the giving the use of the wagons can infer no such duty. If there had been any duty upon the Caledonian Company as in a question with the pursuer's deceased husband, it appears to me that it would have been a duty not merely to have their wagons inspected after arriving at Dumfries, but really to give sound wagons—such wagons that if an accident happened from them the Caledonian Railway Company should only be excused on the ground of a latent defect which could not be discovered. But I can see no ground whatever for holding that having parted with the wagons at the station, and having nothing to do with the contract of carriage subsequently, which might have been for a long or a short journey, there was a duty upon the Caledonian Company, in a question with a stranger to them, to have their wagons either in a sound condition or examined with care. It may or may not be that the Caledonian Company had some duty towards the Glasgow and South Western Company—when I say "some duty" I mean some obligation under a separate contract with them; but with that we have nothing to do here, because there is no such contract alleged in the first place, and, even if there were, I do not think that the husband of the plaintiff could have taken the benefit of it. Such a contract would be res inter alios.

My Lords, I notice, as your Lordship now upon the woolsack has said, that there seems to have been some discussion, or rather consideration, on the part of Lord Young and Lord Trayner, who gave the conflicting decisions as to whether the averment I have read amounts to a statement that the carriages were lent gratuitously by the one company to the other, or whether there was some valuable consideration given for the use of them. But whether it was loan gratuitous, or whether it was a use given for payment of money, that is a transaction entirely between the two railway companies—we know nothing about it here—we cannot look at it; but whatever that transaction may be, whether it might be such as would infer an obligation on the part of the Caledonian Company in a question

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with the Glasgow and South Western Company to furnish sound wagons or to examine the wagons—whether it be such a stipulation as would possibly give the Glasgow and South Western Company a right of relief in the case of a claim such as is here made, if the claim should be successful, it certainly is a question which cannot arise here. There is one thing that is quite clear, and that is that whatever the arrangement between these two companies one with the other might be, that would never give a stranger to the Caledonian Railway Company—a mere servant of the Glasgow and South Western Company—a direct right of action against the Caledonian Railway Company in circumstances such as these.

My Lords, the only possible view upon which I think such an action as this could have been maintained was that pressed upon us on the authority of the case to which your Lordships have already referred of *Heaven* v. *Pender* (1); but I agree in thinking, on the ground which your Lordship has stated, that that case has really no application to the present. The particular defect complained of there was in a part of the general works which the dock company was obliged to keep up or kept up for the use of the workman injured; and that being so, the general rule that the dock owners were responsible for their gangways and other appliances within the dockyard is sufficient to explain the decision arrived at.

Nor, as was suggested by the Lord Advocate, is it a case in which you can say that the cause of the accident was an instrument noxious or dangerous in itself which might produce an accident from the mere handling of it. It is not a case of that kind, where it may be that wider and other responsibilities might arise.

My Lords, this being neither the case of a trap or an invitation to use a trap, nor a case of a noxious instrument, and there being no contract or obligation between the pursuer's husband and the Caledonian Railway Company in regard to the providing of these wagons, I am of opinion with your Lordships that the pursuer has failed to state a relevant ground upon

(1) 11 Q. B. D. 503.

which liability of the defenders can be founded, and that, therefore, this appeal should be sustained, and the interlocutor reversed with costs.

Ordered, that the interlocutor of January 29, 1897, *complained of in the appeal, be reversed: And it is further ordered, that the cause be, and the same is hereby, remitted back to the Court of Session in Scotland, with directions to dismiss the action as against the appellants, and to find the appellants entitled to the expenses of process in the Courts below: Further ordered, that the respondent do pay to the appellants their costs of the appeal to this House.*

Lords' Journals, November 16, 1897.

Agents for appellants: *Grahames, Currey & Spens, for H. B. Neave, Solicitor, Glasgow; and Hope, Todd & Kirk, W.S., Edinburgh.*

Agent for respondent: *F. B. Carritt, for Emslie & Guthrie, Solicitors, Edinburgh.*

[PRIVY COUNCIL.]

J. C.* 1897 *Feb.* 25; *Nov.* 19.

ANNIE BROWN. . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR NEW ZEALAND . . . . . } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, WELLINGTON, NEW ZEALAND.

New Zealand Criminal Code, 1893, *s.* 24—*Marital Coercion.*

Where the jury found that the prisoner, a married woman, had acted under her husband's control in the commission of an offence for which they were jointly charged but separately tried, but it appeared that there was no evidence to that effect, and that the question should not have been left to the jury:—

Held, that whatever the true effect of s. 24 of the New Zealand Criminal Code as to marital compulsion, leave to appeal from an order affirming the conviction had been granted under a misapprehension of fact, and that the appeal must be dismissed.

APPEAL from a decision of the Court of Appeal (April 27, 1896) to the effect that the conviction of the appellant be affirmed.

On December 4, 1895, the appellant was charged jointly with her husband, and pleaded not guilty to an indictment stating that she had on the previous August 10 committed the offence next hereinafter mentioned.

She was tried separately from her husband, and on her application the Chief Justice reserved a case for the opinion of the Court of Appeal, the material part of which is as follows:—

"This is a case stated under sub-s. 6 of s. 412 of the Criminal Code. Annie Brown was indicted jointly with John Henry Brown, that they, with intent to procure the miscarriage of a certain woman named in the indictment, unlawfully did use a certain instrument. In a separate count the same persons were charged with using, with like intent, certain other means to the jury unknown.

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

"A separate trial was applied for on behalf of the two: the application was granted. Annie Brown was tried first. On her trial she was convicted. The jury, in answer to a question put by me, found that Annie Brown was married to the male prisoner, and that she acted under his marital control. At the request of Annie Brown's counsel, I reserved the question whether the fact that the offence had been committed under the control or by the command of the husband was a defence. It was explained to the jury that there was no evidence of such compulsion as is mentioned in s. 24 of the Criminal Code, and it must be taken that they did not intend by this finding that there had been such compulsion, but only command and control of the husband without such threats. The doubt is whether, since the passing of the Criminal Code, s. 24, marital control or command is a defence.

"On the hearing of the above appeal the case was amended by setting out the jury's special finding as follows:—

"'If you find her guilty, then I think you should say whether or not you find that she was married to the other defendant; and if you find she was married to him, did she in the part she took in the commission of the crime act freely and voluntarily, or under the control and coercion of her husband?'

"*Answer.*—The jury find that the prisoner is married to the other defendant, and that she acted under his control."

The Criminal Law of New Zealand is constituted by the Criminal Code of 1893, which is an adaptation to the circumstances of the Colony of the English Draft Code of 1879. The material sections of that Code are s. 24, which is set out in their Lordships' judgment, and s. 21: "All rules and principles of the common law which render any circumstances a justification or excuse for any act or omission or a defence to any charge, shall remain in force and be applicable to any defence to a charge under this Act except in so far as they are thereby altered or are inconsistent therewith."

Mayne, for the appellant, contended that the order affirming the conviction was erroneous, and that the conviction should be reversed. No judgment or reasons for the order had been

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delivered, but from notes supplied by the appellant's solicitor in New Zealand it appeared that the judges thought that the common law doctrine of marital coercion was swept away by the Code, and that s. 24 was substituted for it; and that a wife was in exactly the same position as any other person, and could only plead such a compulsion as was defined by that section. It was contended that that common law doctrine was preserved by s. 21, and not abolished by s. 24; which latter was intended to define a well-known class of cases other than those where a wife acts under the influence of her husband. The net result of the two sections, construed together, was to maintain the English common law on both points exactly as it was before. Reference was made to *Reg.* v. *Cruse.* (1)

Sir R. Reid, Q.C., and *E. Harrison*, for the respondent, were not heard.

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Nov. 19.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. Their Lordships intimated at the hearing of this appeal that they would humbly recommend to Her Majesty that it should be dismissed. They think it right to add now that if the facts had been understood at the time application was made for leave to appeal, that leave would not have been granted.

It is a little difficult to understand why even at the original trial any question was reserved for the Court of Appeal in the Colony.

In the case stated by the Chief Justice it is said that at the request of the prisoner's counsel he reserved the question whether the fact that the offence had been committed under the control or by the command of the husband was a defence. And further on the learned judge states that the doubt was whether, since the passing of the 24th section of the Criminal Code, marital control or command was a defence. That section is as follows:—

Sect. 24: "(1.) Except as hereinafter provided compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence, shall

(1) (1838) 2 Moody, 53; S.C. 8 C. & P. 541.

be an excuse for the commission by a person subject to such threats and who believes such threats will be executed (and who is not a party to any association or conspiracy the being a party to which rendered him subject to compulsion) of any offence other than treason, murder, piracy, offences deemed to be piracy, attempting to murder, assisting in rape, forcible abduction, robbery, causing grievous bodily harm and arson. (2.) No presumption shall be made that a married woman committing an offence does so under compulsion only because she commits it in the presence of her husband."

Whatever may be the proper solution of these questions, their Lordships are of opinion that none of them arise upon the evidence set out in the case.

There was no evidence, as the Chief Justice himself states in the case reserved, of any such compulsion as is referred to in the section in question. The offence charged was not committed by one in the presence of the other at all. The evidence upon which the prisoner was apparently convicted, and properly convicted, was the procuring and contriving the commission of the offence committed by the husband in her absence and under circumstances wherein the section above set out could have had no application whatever.

The Chief Justice states that the jury at the trial found that the prisoner was married to the other defendant, and that she acted under his control.

For the latter proposition there is not a scintilla of evidence, and no such question should have been left to the jury. The mere fact that the parties are married never even formed a presumption of compulsion by the husband. Even as early as Bracton's time, if the wife was voluntarily a party to the commission of a crime, her coverture furnished no defence: see Bracton, Book 3, c. 32, who says:—

"Quid erit si uxor cum viro conjuncta fuerit, vel confessa fuerit quod viro suo consilium præstiterit et auxilium? Numquid tenebuntur ambo? imo ut videtur," and he goes on to add, "sic ut sunt participes in crimine, ita debent esse participes in pœnâ."

Questions have from time to time arisen how far the mere

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presence of the husband at the time of the commission of the offence should furnish a presumption of marital control, and the decisions on that subject have not been entirely uniform. But their Lordships are of opinion that here even that question does not arise. The acts attributed to the prisoner were acts done by herself in the absence of her husband, conclusively establishing that she was voluntarily acting and aiding and assisting in arrangements leading up to and intended to assist the commission of the offence which was afterwards consummated.

Their Lordships are therefore of opinion that no such question was open upon the facts as detailed, and the finding of the jury is only intelligible on the ground that they supposed that the mere fact of coverture itself furnished legal evidence of compulsion within the rule of law, which view their Lordships are of opinion was entirely erroneous.

It is for these reasons that their Lordships have thought it right humbly to advise Her Majesty that this appeal should be dismissed.

Solicitors for appellant: *Royle & Co.*

Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

PARSONS AND OTHERS . . . . . PLAINTIFFS; J. C.* 1897 Nov. 18; Dec. 15.

AND

GILLESPIE AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Trade Name—"Flaked Oatmeal"—Term of ordinary Description—Identification of Name with Goods by User—Injunction.

Where the plaintiffs without relying on their registered trade-mark, which consisted in part of the term "Flaked Oatmeal," claimed that they had by user so intimately identified the term with their goods that the use of it by the defendants in their trade-mark had the effect of passing off their goods as the plaintiffs' goods:—

Held, that the term being one of ordinary and not exclusive description, and being applicable to the defendants' goods as well as the plaintiffs', and the defendants' user thereof not having been proved to have had or to be calculated to have the above effect, the suit must be dismissed with damages resulting from the grant of an interim injunction.

Reddaway v. *Banham*, [1896] A. C. 199, approved.

APPEAL from an order of the Supreme Court (Nov. 6, 1896).

The action was brought by the appellants to obtain an injunction to restrain the respondents from applying to any preparation not being of the appellants' manufacture the term "Flaked Oatmeal," or from selling as "Flaked Oatmeal" any preparation not being of the appellants' manufacture, and for an account of profits or damages.

The statement of claim alleged (inter alia) that the words "Flaked Oatmeal" formed part of the registered trade-mark of the appellants, and that the term "Flaked Oatmeal" was a fancy term, originally adopted by the appellants, which had become and was a trade name exclusively designating a commodity manufactured and sold by the appellants.

The defence denied (inter alia) that the term "Flaked Oatmeal" was the appellants' trade-mark, or that it was or had

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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become a particular name exclusively referring to any preparation manufactured and sold by the appellants, or that persons ordering "Flaked Oatmeal" would expect or intend to be supplied with a commodity of the appellants' manufacture. The defence further alleged that the term "Flaked Oatmeal" was, previously to the registration of the appellants' trade-mark, publici juris.

Upon the evidence the Chief Judge in Equity found "that the defendants can distinguish and have distinguished their preparation from that of the plaintiffs so that it is not calculated to deceive the public."

Moulton, Q.C., and *Sebastian*, for the appellants, contended that it had been proved that the term "Flaked Oatmeal" was first adopted by the appellants; that it was a term of artificial rather than of ordinary description; and that it had since March, 1890, exclusively distinguished rolled oats manufactured by the appellants from all other preparations of oats. Accordingly the term had by user acquired the signification that the preparation to which it is applied is rolled oats of the appellants' manufacture. The term is an essential and distinctive particular of the appellants' registered trade-mark; and the respondents adopted it with full notice of the appellants' right, and without clearly distinguishing their preparation (to which they applied it) from the appellants' preparation. Not merely is the term an essential part of the appellants' trade-mark; it is also a trade name exclusively designating rolled oats manufactured by them which trade name cannot be used by the respondents without deception; for their preparation was not properly and accurately described thereby. Reference was made to *Reddaway* v. *Banham*. (1)

C. E. E. Jenkins, *Walter*, and *Easton*, for the respondents, contended that the term "Flaked Oatmeal" was a true and correct name applicable to the commodity manufactured and sold under that name by the respondents. It did not on the evidence denote a commodity manufactured and sold exclusively by the appellants, who had admitted that their prepara-

(1) [1896] A. C. 199.

tion was flaked oats and not flaked oatmeal. The Chief Judge was right in holding that the term ought not to have formed part of the appellants' trade-mark, since it was misleading. "Flaked" is a term of common use in commerce applicable to various articles in a similar physical condition, such as rice, barley, tapioca, and cocoa. The respondents never attempted or intended to pass off their manufacture for that of the appellants, nor were the public misled in fact into any erroneous belief on the subject, nor was their conduct calculated in any way to mislead.

Sebastian replied.

1897 *Dec.* 15.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The question raised in this suit is whether a trade-mark or a trade name which the plaintiffs (now appellants) claim as their own has been wrongly used by the defendants who are respondents in this appeal. It appears that until within the last few years the only method used in this Colony of preparing oats for making porridge was by grinding them into fine meal or powder; but that shortly before the year 1890 new processes were introduced by which the oats were not ground into powder, but were crushed or flattened between rollers. In the month of March, 1890, the plaintiffs perfected one of these processes and called the product "flaked oatmeal." Exhibit A is a specimen of this product. In the month of June, 1890, the plaintiffs obtained the registration of a trade-mark which in the registrar's certificate is thus described:—

"A lion rampant against a sheaf of corn, the background being filled with a landscape and a pair of balance scales, below the lion is a scroll upon which are the Latin words 'Justus Esto Et Non Metue.' The trade-mark is surrounded with a double line in the form of a circle. Above the circle are the words 'Use Parsons' and below the circle are the words 'Finest Flaked Oatmeal.'"

That trade-mark has ever since been used by the plaintiffs, and the commodity so marked has met with a large sale.

From 1890 to 1896 several preparations of crushed or flattened

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oats more or less resembling that of the plaintiffs were put upon the market. Most of them were called "rolled oats" either simply or with some addition indicative of the maker. One was called "Oat Flakes," one "Wafer Oatmeal." None was called by the precise name of "Flaked Oatmeal."

In the year 1894 the defendants produced a preparation of rolled or crushed oats which they called "Rolled Oatmeal." Exhibit C is a specimen of it. This process was not satisfactory to them, and very soon they adopted another by which the oats were first ground small and then the meal so obtained was steamed and passed through rollers to be flattened or flaked. Exhibits B and L are specimens of this process. The right of the defendants to use this or any other process as against the plaintiffs is not questioned, and the nature of the process is only important in its bearing on the use of the name "Flaked Oatmeal," which is questioned.

In December, 1894, the defendants applied to register a trade-mark for their then manufacture. The device they chose is something entirely different from that of the plaintiffs; but they inscribed it with the words "Gillespie's Flaked Oatmeal," the two latter words standing by themselves below the device. The plaintiffs raised objection to this, and the Registrar-General informed the defendants that they could not use the term "Flaked Oatmeal" as a prominent feature in their trade-mark, and that the plaintiffs by their registration in 1890 had acquired the right to use those words. The defendants did not press for registration any further, but they put their goods on the market labelled with the same device and inscription, or some slight variation of it.

In May, 1896, the plaintiffs instituted this suit against the defendants for an injunction, and an account of profits and damages. They rested their case not on the possession of the trade-mark, but on the right to exclusive use of the term "Flaked Oatmeal." They prayed as follows:—

"That the defendants their servants and agents may be restrained by the order and injunction of this Court from applying to any preparation not being of the plaintiffs' manufacture the term 'Flaked Oatmeal,' or from selling as 'Flaked

'Oatmeal' any preparation not being of the plaintiffs' manufacture."

An interlocutory injunction was granted in those terms; but at the hearing before the Chief Judge in Equity the Court dismissed the suit with costs, and directed an inquiry as to the damages sustained by the defendants by reason of the injunction. That is the decree from which this appeal is brought.

There is nothing in the decree to prejudice the plaintiffs' right to their trade-mark. Neither in their statements nor in their prayer do the plaintiffs rest their case on the trade-mark, and the mere dismissal of their suit does not deny their right. But in his judgment the learned judge goes beyond the dismissal of the suit. He says that the suit is instituted to try the right of the plaintiffs to the trade-mark; and he expresses an opinion that the words "Flaked Oatmeal" ought not to have formed part of that mark. The appellants point out that the register is conclusive until altered in the way prescribed by statute, i.e., by a suit framed for the purpose. Their Lordships are not in a position to know what may have taken place in Court to give to the litigation a character which the pleadings do not give to it. They confine themselves to the decree appealed from, and they express no opinion on the question whether the plaintiffs may or may not use the term "Flaked Oatmeal" as part of their trade-mark in conjunction with a number of other matters.

With these remarks their Lordships pass by the subject of trade-mark. The plaintiffs have no case—indeed, they do not put forward a case—for complaint against the defendants on the score of the trade-mark unless by virtue of the registration they have acquired an exclusive right to that portion of it which consists of the term "Flaked Oatmeal." The defendants' trade-mark bears no resemblance to that of the plaintiffs' as a whole. The question whether the defendants can use the term "Flaked Oatmeal" does not depend upon the trade-mark, but is part of the wider question whether the plaintiffs have by user identified the term with their goods so intimately that the use of it by another person has the effect of passing off his goods as the goods of the plaintiffs. That is the substantial

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ground on which the case of the plaintiffs has been argued at this bar.

It will be convenient here to state the principles of law by which the contention of the plaintiffs must be tested; and that cannot be done better than was done by the learned judge below in quoting the language use by Lord Herschell in *Reddaway* v. *Banham.* (1)

Lord Herschell there said: "The name of a person or words forming part of the common stock of language may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive the purchaser into the belief that he was getting the goods of A. when he was really getting the goods of B."

"In a case of this description the mere 'proof by the plaintiff that the defendant was using a name word or device which he had adopted to distinguish his goods would not entitle him to any relief.'"

"He could only obtain it by proving further that the defendant was using it under such circumstances and in such manner as to put off his goods as the goods of the plaintiff."

The plaintiffs then must shew either that the term "Flaked Oatmeal" is not part of the common stock of language in the sense that it is not a term of description, but is of an arbitrary or fanciful nature invented by the plaintiffs which the inventor may claim to have appropriated; or they must shew that the term, being originally a description of the article itself, has come in practice to denote goods made by the plaintiffs. To both these points the plaintiffs have carefully addressed themselves. They maintain that the expression "Flaked Oatmeal" does not properly describe their own goods or those of the defendants, but is an artificial expression fit for appropriation by anyone who has hit upon it.

Now, nobody can look at Exhibit A without seeing that the word "Flaked" is a correct description. The oats have been only partially reduced to powder, and are presented in small flattened morsels like flakes of snow. The term is one in

(1) [1896] A. C. 199.

common use for food grains or other vegetable substances so treated by rolling or crushing, such as "flaked rice," "flaked barley," "flaked tapioca," "flaked cocoa," and so forth. But then it is said that the article is not "meal" because it is not ground to powder. Whether the word "meal" would by etymology or in the very strictest use of language be applicable to that which has passed through the mill, but is only partially reduced to powder, is a point as to which their Lordships think that no nice inquiry need be made. It is a natural and obvious term to use for oats so treated—one which everybody would accept at once as appropriate enough; and probably everybody who breakfasted off porridge made from such a material would think and say that he was eating oatmeal porridge.

Then it is contended that the product of the defendants is not oatmeal, and that their adoption of an inappropriate name shews an intention of trading on the reputation acquired by the plaintiffs. It seems to their Lordships that the name as applied to the defendants' product is strictly appropriate; for they do reduce the oats to powder, which is afterwards steamed, rolled, and so flaked. The plaintiffs have been reduced to contend on this point that because the defendants take away some 5 per cent. of the finest powder the rest is not oatmeal; and further that to roll or flake oatmeal is impossible. To support these two contentions they brought several witnesses in the Court below; but the Court rightly gave no weight to the evidence, which has been little insisted on here.

Then has there been any such secondary use of the term as to identify it with the plaintiffs' manufacture? To prove that there has been, the plaintiffs call a number of grocers who say that when customers asked for "Flaked Oatmeal" they supplied the plaintiffs' goods. That was a matter of course during the five or six years for which nobody except the plaintiffs purported to sell goods under that name. One witness, a miller, says in terms that between 1892 and the beginning of 1896 the words "Flaked Oatmeal" had got to mean the plaintiffs' manufacture. That seems to their Lordships somewhat slender evidence to prove such a general association of the name of the product with the producer as to entitle the plaintiffs to say that

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the use of the name by another is an encroachment on their rights.

But supposing the evidence sufficient on this point, it falls far short of shewing that the proceedings of the defendants are such as to cause confusion between their goods and those of the plaintiffs. There is no evidence that any buyer has got the defendants' goods when he desired to have those of the plaintiffs; nor that any seller has made confusion between the two. As for external resemblance of the packages or labels, it has been shewn before with reference to the trade-mark that there is nothing of the kind except in the use of the two disputed words. In fact, the defendants could hardly have done more to shew that the articles came from different makers.

The result is that in their Lordships' judgment the defendants have done no more than they had a right to do in taking appropriate words of ordinary description to indicate the article which they make and sell, and that their action is not calculated to pass off their manufacture as that of the plaintiffs, and is not proved in point of fact to have done so. Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs.

Solicitors for appellants: *Walker, Martineau & Co.*
Solicitors for respondents: *Snow, Snow & Fox.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO . . . . . } RESPONDENT.

J. C.* 1897 *July* 30; *Dec.* 8.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

British North America Act, 1867, *s.* 92, *sub-ss.* 1, 4, 14—*Powers of Provincial Legislature—Revised Statutes of Ontario*, 1877, *c.* 139—*Provincial Bar—Power to issue Patents of Precedence.*

Held that, according to the true construction of the British North America Act, 1867, s. 92, sub-ss. 1, 4, and 14, Revised Statutes of Ontario, 1877, c. 139, which empowers the Lieutenant-Governor of the province to confer precedence by patents upon such members of the bar of the province as he may think fit to select, is intra vires of the provincial legislature.

APPEAL from a judgment of the Court of Appeal (Nov. 10, 1896) on a reference of certain questions in a case stated by the Lieutenant-Governor under Ontario Act 53 Vict. c. 13; which questions are as follows:—

(1.) Whether since March 29, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario by letters patent in the name of Her Majesty under the Great Seal of Ontario,

(*a*) To appoint from among the members of the bar of Ontario such persons as he deems right to be during pleasure Her Majesty's Counsel for Ontario;

(*b*) To grant to any member or members of the bar of Ontario a patent or patents of precedence in the courts of Ontario.

(2.) Whether appointments of Queen's Counsel and grants of precedence such as are in the case stated to have been made by the Lieutenant-Governor of Ontario since the said date are and would be valid and effectual to confer on the holders thereof the office and precedence thereby purported to be granted.

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, SIR HENRY DE VILLIERS, and SIR HENRY STRONG.

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(3.) Whether members of the bar of Ontario from time to time appointed, or to be appointed, as aforesaid by the Lieutenant-Governor of Ontario by letters patent in Her Majesty's name under the Great Seal of Ontario to be Her Majesty's Counsel for Ontario, and members of the bar of Ontario to whom from time to time patents of precedence in the courts of Ontario have been or may be granted by the Lieutenant-Governor of Ontario, as aforesaid in conformity with the limitations of the revised Statute of Ontario, ch. 139, have or shall become entitled to such precedence in the courts of Ontario as have been or may be assigned to them by such letters patent after the several persons or classes referred to in the 3rd, 5th, and 7th sections of the said revised statute of Ontario.

(4.) Whether the position as to precedence in the courts of Ontario of the remaining members of the bar of Ontario not comprised within the classes referred to in the said 3rd, 5th, and 7th sections, and not holding patents issued by the Lieutenant-Governor of Ontario conferring on them the office of Queen's Counsel for Ontario, or granting to them precedence in the courts of Ontario, is as between them and those holding such patents as aforesaid subsequent to those holding such patents, and as between themselves in order of their call to the bar of Ontario.

(5.) In case the answer to any of the said questions be in the whole or in part negative, or in case an affirmative answer shall appear to the Court not to be a complete exposition of the matters involved, then what is the true state and condition of the matters involved in such questions.

The Court decided unanimously in favour of the provincial view, answering the first four questions in the affirmative. No answer to the fifth question was given except by Burton J., who considered that the right to appoint Queen's Counsel in the provincial courts was vested exclusively in the Lieutenant-Governor of the province.

Hagarty C.J. pointed out that the Judicial Committee of the Privy Council had decided that a Lieutenant-Governor was the representative of the Queen for all purposes of provincial government; he held that the Lieutenant-Governor had there-

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fore, apart from provincial legislation, the right to appoint and to grant precedence, subject to regulation by the provincial legislature, under the 14th enumeration of s. 92 of the British North America Act of 1867; and also that the legislation was valid; and he decided that the four questions must be answered in the affirmative.

The other judges added that the matter came within sub-ss. 4, 13, and 14.

Haldane, Q.C., *Mactavish, Q.C.*, and *F. Russell*, for the appellant.

Blake, Q.C., and *Irving, Q.C.*, for the respondent.

The case of *Lenoir* v. *Ritchie* (1) was cited.

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Dec. 8.

The judgment of their Lordships was delivered by

LORD WATSON. On March 29, 1873, the legislature of the Province of Ontario passed two Acts, entitled respectively, "An Act respecting the appointment of Queen's Counsel," and "An Act to regulate the precedence of the bar of Ontario." These statutes were consolidated and their provisions re-enacted by c. 139 of the Revised Statutes of Ontario, passed on December 31, 1877. The Act of 1877 makes regulations for the qualification of barristers-at-law and their admission to practise at the bar in Her Majesty's Courts of Law and Equity in Ontario. It declares that it "was and is lawful for the Lieutenant-Governor, by letters patent under the Great Seal of the Province of Ontario, to appoint from among the members of the bar of Ontario such persons as he may deem right to be, during pleasure, provincial officers under the names of Her Majesty's Counsel learned in the law for the Province of Ontario." It also enacts that the Lieutenant-Governor, by letters patent under the Great Seal of Ontario, may grant to any member of the bar a patent of precedence in the Courts of Ontario. In virtue of the authority thus conferred upon him the Lieutenant-Governor has from time to time exercised the right of issuing letters patent in Her Majesty's name to members of the provincial bar.

(1) (1875) 3 Sup. Ct. Rep. 575.

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By the Canadian Act, 38 Vict. c. 11, which established a Supreme Court and a Court of Exchequer for the Dominion, all persons who are barristers or advocates in any of the provinces were permitted to practise as barristers, advocates, or counsel in the Supreme Court; and the same enactment has been repeated in s. 16 of c. 135 of the Revised Statutes of Canada. The Governor-General of Canada has, on various occasions between May, 1879, and January, 1890, issued letters patent in Her Majesty's name, under the Great Seal of Canada, by which he appointed certain members of the provincial bar of Ontario to be Queen's Counsel; and on these occasions the letters patent did not specify any territory or court for which the appointment was made, or in which it was to receive effect. The Government of Ontario does not appear to have at any time disputed that it was within the exclusive competency of the Governor-General of Canada to appoint members of the bar to the rank of Queen's Counsel in the courts of the Dominion; but it has carefully refrained from making the concession that the Governor-General has any right to appoint Queen's Counsel for the province from the provincial bar. On the other hand, the Dominion Government has persistently maintained that the appointment of Queen's Counsel to represent Her Majesty, whether in the Canadian or in the provincial courts, involves an exercise of the Royal prerogative which belongs to the Governor-General of the Dominion. The main reason put forward in this appeal by the Attorney-General for the Dominion is to the effect that "the Lieutenant-Governor of Ontario does not entirely represent the Crown in respect of the prerogative right of the Crown; and in particular does not represent the Crown in respect of the prerogative right or power of appointing Queen's Counsel for Ontario, or granting patents of precedence in the courts of Ontario."

In order to ascertain whether he was legally justified in issuing these patents, the Lieutenant-Governor, availing himself of the provisions of the Provincial Act, 53 Vict. c. 13, referred five separate questions to the Court of Appeal for Ontario for hearing and consideration. The Attorney-General for the Dominion, who is the appellant to this Board, appeared

and took part in the discussion; and, on November 10, 1896, the Court, consisting of Hagarty C.J., with Burton, Maclennan and Street JJ., answered four of the queries in the affirmative, with the effect of sustaining the legality of the action of the Lieutenant-Governor. No answer was made to the fifth query, which is framed upon the assumption of the other queries being answered in the negative.

In order to explain the issue raised by this appeal, it is sufficient to refer to the terms of the first query, which are as follows:—

"(1.) Whether since the 29th of March, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario by letters patent under the Great Seal of Ontario,

"(*a*) To appoint from among the members of the bar of Ontario such persons as he deems right to be during pleasure Her Majesty's Counsel for Ontario;

"(*b*) To grant to any member or members of the bar of Ontario a patent or patents of precedence in the courts of Ontario."

The second and third queries relate to the validity of the rights conferred upon the patentees, and present the same questions in a different aspect. The fourth query relates to the question of precedence in the courts of Ontario between those members of the bar who are the holders of patents of precedence and those who are not. The points thus referred to the determination of the Court of Appeal do not directly raise any controversy in regard to the jurisdiction and power of the Governor-General of Canada; they are strictly limited to the rights of the Lieutenant-Governor of Ontario to appoint Queen's Counsel from the provincial bar whose functions are limited to the province, and to grant patents entitling the holder to take precedence at the bar of the provincial courts.

The appointment of counsel for the Crown, and the granting of precedence at the bar to certain of its members, are matters which do not appear to their Lordships to stand upon precisely the same footing. In England the first of these rights has always been matter of prerogative in this sense, that it has been personally exercised by the Sovereign with the advice of the

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Lord Chancellor, the appointment being made by letters patent under the sign-manual. In early times the appointment was accompanied with a fee or retainer of moderate amount, but that formality has long since fallen into abeyance. The terms of the patent have been limited to appointing the grantees to be of counsel for the Sovereign, subject to the condition that they are to take precedence inter se according to the priority of their appointment. Royal patents of precedence inter se were in use to be granted to serjeants-at-law who did not derive their position from the Crown. (1) Beyond these limits the Sovereign has never in modern times professed to confer upon Crown Counsel, or other members of the bar, a right of precedence or pre-audience in the courts of England. These are matters which have been regulated in practice either by the discretion of the bench or by the courtesy of the profession. The effect of an appointment as Queen's Counsel is that the holder cannot appear in court as counsel for any party litigating with the Crown unless he has obtained a licence from Her Majesty.

The exact position occupied by a Queen's Counsel duly appointed is a subject which might admit of a good deal of discussion. It is in the nature of an office under the Crown, although any duties which it entails are almost as unsubstantial as its emoluments; and it is also in the nature of an honour or dignity to this extent, that it is a mark and recognition by the Sovereign of the professional eminence of the counsel upon whom it is conferred. But it does not necessarily follow that, as in the case of a proper honour or dignity, the elevation of a member of the bar to the rank of Queen's Counsel cannot be delegated by the Crown, and can only be effected by the direct personal act of the Sovereign. Even in the case of titles of honour, it does not appear to be doubtful that the Sovereign may, with the assistance of an Act of the Legislature, exercise the prerogative in a manner which would but for its provisions be unconstitutional. It was adjudged by the House of Lords in the case of the Wensleydale Peerage that it was beyond the constitutional right of the Monarch to confer upon a life peer

(1) See note, 16 C. B. (N.S.) 1.

of any rank whom Her Majesty might choose to create the privilege of sitting and voting in Parliament. But life peerages carrying that privilege have since then been created by the Crown under the authority of and to the extent permitted by the Appellate Jurisdiction Act, 1876.

In the Province of Ontario the right of appointing Queen's Counsel has been committed to the Lieutenant-Governor by an Act passed by the provincial parliament with the sanction of the Crown. Assuming it to have been within the competency of the provincial legislature to vest that power in some authority other than the Sovereign, the Lieutenant-Governor appears to have been very properly selected as its depositary, seeing that, by s. 65 of the British North America Act, he is entrusted with the whole executive powers, authorities, and functions which before the Union had been vested in or were exercisable by the Governor or Lieutenant-Governor of the Province of Canada, in so far as these powers, authorities, and functions may be necessary for the government and administration of the new Province of Ontario.

The next and only other point requiring to be considered in this case is, whether the legislature of Ontario had jurisdiction to confer upon the Lieutenant-Governor those powers which are now embodied in the revised statute of December, 1877. That is a question which can only be solved by reference to the provisions of the Imperial Act of 1867; and there are three of the enactments of s. 92 which appear to their Lordships to have an immediate bearing upon it. The first head of that clause gives to the legislature of each province exclusive authority to make laws from time to time for the amendment of the constitution of the province, "except as regards the office of Lieutenant-Governor." By sub-s. 4 of the same clause, "the establishment and tenure of provincial offices, and the payment of provincial officers." Again, by the 14th head, the legislature is empowered to make laws in relation to the administration of justice in the province, "including the constitution, maintenance, and organization of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in these courts"

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By the combined effect of these enactments it is entirely within the discretion of the provincial legislature to determine by what officers the Crown, or in other words the executive government of the province, shall be represented in its courts of law or elsewhere, and to define by Act of Parliament the duties, whether substantial or honorary, which are to be incumbent upon these officers, and the rights and privileges which they are to enjoy. The revised statute of 1877, in so far as it relates to the appointment of Queen's Counsel, is, in the opinion of their Lordships, within the limits of that legislative authority; and, that being so, there appears to them to be no ground for the suggestion that its provisions, when given effect to by the Lieutenant-Governor, will constitute an encroachment upon the prerogative of the Crown, or upon the rights of any representative of the Crown to whom, by the terms of his commission, the right of appointing counsel to represent the Sovereign may have been delegated.

On the other hand, the enactments of s. 92, sub-s. 14, confer upon the provincial legislature in wide and general terms power to regulate the constitution and organization of all courts of law in the province, civil or criminal. It is no doubt true that with two exceptions, these being the Courts of Probate in Nova Scotia and New Brunswick, the appointment of the judges of the superior, district, and county courts in each province is committed to the Governor-General of Canada by s. 96, subject to the condition that, until the laws of the provinces are made uniform, these judges must be selected from the bar of the province in which the appointment is made. And, by s. 100, the right to fix the salaries, allowances, and pensions of these judges, except in the case of the Courts of Probate in Nova Scotia and New Brunswick, is vested in the Parliament of Canada, upon which there is also imposed the duty of providing the salaries, allowances, and pensions so fixed. But in all other respects the courts of each province, including the judges and the officials of the court, together with those persons who practise before them, are subject to the jurisdiction and control of the provincial legislature; that legislature and no other has the right to prescribe rules for the qualifications

and admission of practitioners, whether they be pleaders or solicitors. Their Lordships, in these circumstances, do not entertain any doubt that the Parliament of Ontario had ample authority to give the Lieutenant-Governor power to confer precedence by patent upon such members of the bar of the province as he may think fit to select.

For these reasons their Lordships will humbly advise Her Majesty to affirm the decision appealed from. Following the rule which has been hitherto adopted in similar cases, they will make no order as to costs.

Solicitors for appellant: *Day, Russell & Co.*
Solicitor for respondent: *S. V. Blake.*

[HOUSE OF LORDS.]

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CALEDONIAN RAILWAY COMPANY. APPELLANTS;

AND

TURCAN AND OTHERS . . . . . RESPONDENTS.

Lands Clauses Acts—Railway Company—Compensation—"Part of House"—Material Detriment to remainder—Access over Land taken—Power of Company to grant Right of Way—Arbitration—Finality of Scottish Award—Right of one Tenant in Common—Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 *Vict. c.* 19), *s.* 90—*Railways Clauses Consolidation (Scotland) Act* (8 & 9 *Vict. c.* 33), *ss.* 46, 49, 60.

A railway company were entitled by a section in their special Act, notwithstanding s. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, to take a portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The company gave notice to treat for 232 square yards, a portion of the scheduled property, which formed an access used jointly by the respondents and another firm. The respondents required the railway company to take the whole of their property. A statutory submission to arbitration containing the question, whether or not the portion of land containing the 232 square yards could be severed from the remainder of the property of the respondents without material detriment, reserving only the question whether s. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, applied, was entered into. Before the arbitrator the railway company offered to allow access to the remainder of the respondents' property under a bridge over the portion taken. The arbitrator found that the portion containing 232 square yards could not be severed without material detriment to the remainder of the respondents' property, and awarded compensation upon the assumption that the company were bound to take the whole premises. In an action to recover the amount awarded:—

Held, affirming the judgment of the Second Division of the Court of Session, that whether the arbitrator was right or wrong in declining to take the offer of the company into consideration in assessing the compensation, his award, until set aside by a proper process, was binding on the Court, and could not be reviewed.

Gonty v. *Manchester, Sheffield and Lincolnshire Railway*, [1896] 2 Q. B. 439, distinguished.

APPEAL from a judgment of the Second Division of the Court of Session, Scotland. (1) The appellants, the Caledonian Railway

(1) 35 S. L. R. 404.

Company, by virtue of the Caledonian Railway (Edinburgh, Leith, and Newhaven Extension Lines) Act, 1890 (53 & 54 Vict. c. clxvii.), and the public Acts incorporated therewith, were empowered to take for the purposes of their railways the whole of the property of the respondents, Messrs. Turcan and others, consisting of certain tenements and lands in the parish of South Leith, Scotland, which subjects were distinguished on the map or plan, and described by the book of reference by the Nos. 106 and 109.

Sect. 13 of the appellants' special Act enacts: "Whereas in the exercise of the powers of this Act it may happen that portions only of the lands, buildings or manufactories shewn on the deposited plans may be sufficient for the purposes of this Act, and that such portions may be severed from the remainder of the said properties without material detriment thereto: Therefore, notwithstanding s. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, the owners of and other persons interested in the lands, buildings or manufactories described in the first schedule to this Act annexed, and whereof portions only are required for the purposes of this Act, may (if such portions can, in the opinion of the jury, arbiters, or other authority to whom the question of disputed compensation shall be submitted, be severed from the remainder of such properties without material detriment thereto) be required to sell and convey to the company such portions only, without the company being obliged or compellable to purchase the whole or any greater portion of such properties, the company always paying for the portions taken by them, and making compensation for any damage sustained by the owners of such properties and other persons interested therein by severance or otherwise." The section further provided that if the jury or arbitrator decide that the portion could not be severed without material detriment, the company may within one month from the date of the final decision of such jury or arbitrator withdraw their notice to treat. But no question arose in the appeal on this point, as the notice had not been withdrawn. Then the section continued: "Provided also that nothing in this section contained shall be held as determining whether the properties

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described in the first schedule are or are not subject to the provisions of s. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845."

Sect. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, enacted: "That no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof."

The subjects No. 106 were the respondents' warehouses, &c., and No. 109 was land adjoining the said warehouses, which formed a courtyard and access used jointly by the respondents and Messrs. Lawson, millers, as pro indiviso proprietors. The courtyard had two accesses, of which one consisted of a road for carriages and carts from Manderston Street, Leith; and the other access consisted of a lane, also available for carriages and carts from Leith Walk. The Manderston access was 30 feet wide by 70 feet long, and contained about 232 square yards. The Leith Walk access was 15 feet wide and 240 feet long. The appellants' line crossed the Manderston Street access by means of a bridge, and interfered with neither the respondents' warehouses nor their right of way to the courtyard. The respondents could pass under the railway arch. In July, 1893, the appellants gave notice to the respondents that the portion of land marked red on a plan delivered with the notice, containing 232 square yards, were required, and would be taken and used by them: this land was the solum of the access to Manderston Street, and was a portion of No. 109 on the reference book. The respondents declined to accept such notice, and served the appellants with formal notice in terms of s. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, to the effect that they would not sell and convey to them a part of the said lands and buildings, but only the whole; and intimated that they desired the question of disputed compensation, including the question whether the portion of the lands and buildings proposed to be taken could be severed from the remainder of the respondents' property without material detriment, should be settled by arbitration. A statutory submission was thereafter entered into between the parties for the purpose

of submitting for the determination of the arbitrator the following questions: (1.) The question whether or not the portion of land or property, containing 232 square yards above mentioned, forming part of the land or property marked with the No. 109, could be severed from the remainder of the lands, buildings, and others belonging to the respondents without material detriment thereto; (2.) the amount the appellants were to pay, in the event of it being found that appellants were entitled to take and use said portion of land or property specified in said notice to treat for the purposes of the said railway, without taking the whole of said lands, buildings, and others, . . . excepting the pro indiviso right or interest in said portions of land or property pertaining to Messrs. John and Andrew Lawson, millers, Leith; and (3.), alternatively, the amount of the purchase-money and compensation payable to the respondents for the whole of said lands, buildings, and others belonging to, or occupied by, or in which the respondents have some right or interest, in the event of it being found that the appellants are not entitled to take and use said portion of land or property specified in their notice to treat, without also taking the whole of said lands, buildings, and others.

Then art. 4 of the submission was as follows: "It is hereby provided and declared that these presents are entered into and the matters submitted to the determination of the arbiters as aforesaid, without prejudice always to the contentions and protests of the second party (appellants), that the said portions of land or property specified in the said notice to treat and relative plan are not parts of the foresaid lands and buildings marked with the Nos. 106 and 109 of the said parish and county on the said deposited plans and deposited books of reference within the meaning of the said Lands Clauses Consolidation (Scotland) Act, 1845, and more particularly s. 90 thereof; and that the said portion of land or property specified in the said notice to treat and relative plan are not subject to the provisions of s. 90 of the said Lands Clauses Consolidation (Scotland) Act, 1845; and that, in any event, the said portions of land or property are not, by reason of the second party's (appellants) use thereof for the purposes of the said Caledonian Railway . . . . subject

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to the provisions of that section; which contentions and protests, notwithstanding anything herein contained, shall be reserved entire to the second party (appellants), and with all powers competent to the second party to follow forth their said contentions and protests by all competent process, but declaring that the first party (respondents) shall not be taken as in any way admitting the validity of the second party's (appellants) said contentions or protests, and reserving the said first party's (respondents) answers thereto."

After sundry proceedings an umpire was appointed, and he issued his award on April 18, 1895, finding—(1.) that the portion of land in question could not be severed without material detriment to the remainder; (2.) that in the event of it being found contrary to this view, that the appellants were entitled to take only the portion; the compensation for the same and injury to the remainder of the land was 2270*l.*; and (3.) that in the event of the appellants being bound to take the whole lands and buildings belonging to the respondents, the amount of the purchase-money and compensation payable was 10,000*l.*

The appellants having refused to pay the 10,000*l.*, the respondents raised this action for payment of the sum with interest.

The appellants' contention was, first, that the portion of ground contained in their notice was a road within the meaning of the Railways Clauses Consolidation (Scotland) Act, 1845, ss. 46, 49 (English Act, c. 20, ss. 53, 56), and that the only right which they competently acquired was the right to carry their railway over the road in question by the construction of a bridge. On that assumption they maintained that they had not acquired the absolute property of the ground, but only the solum, and were bound to leave the access open and maintain it as an access or road. Secondly, their contention on appeal was that they were bound to give an accommodation road in terms of s. 60 of the Scottish Railways Clauses Act.

The Lord Ordinary (Lord Low) held, on December 1, 1896, that the access was not a road within the meaning of ss. 46, 49, and 60 of the Railways Clauses Act: *Campbell* v. *Edinburgh and*

Glasgow Ry. Co. (1); and, secondly, that the question whether the arbitrator was bound to take into consideration in fixing the amount to be paid the fact that the access would not be shut up, as the railway was to be carried over it by a bridge, was not among the questions reserved in the minute of agreement and submission, and that, therefore, his Lordship could not deal with it in this action; and that if the appellants desired to raise that question they must take proceedings to have the award set aside.

The Second Division of the Court of Session, by interlocutor dated March 11, 1897, affirmed the Lord Ordinary's decision; but their Lordships held that they could not reconcile the Scottish decision in this House of *Oswald* v. *Ayr Harbour Trustees* (2) with the English case of *Gonty* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3)

1898. Feb. 18, 21, 22. *A. Graham Murray, L.A.*, and *James Avon Clyde* (of the Scottish Bar), for the appellants. The access in question is a private road, and as such the appellants are bound to restore it as a road: ss. 46, 49, Railways Clauses Consolidation (Scotland) Act, 1845; or, alternatively, this is a case where they are bound to erect a bridge in any event to give an accommodation road: s. 60. That it is a road is shewn by the respondents' and Messrs. Lawson's titles, which call this access a road or passage, and provide that it is to be kept open. And being a road it is not, under s. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, a part of the entire property of the respondents. *Gonty's Case* (3) is not inconsistent with *Oswald's Case* (2), nor has *Mulliner* v. *Midland Ry. Co.* (4) anything to do with the point here. *Gonty's Case* (3) is in point. There s. 42 of the special Act is s. 13 of the special Act here, and the appellants can found on that section, and take the access as they find it and give back an easement, and that ought to have been taken into account by the arbitrator.

[*Cripps, Q.C.* The Lord Advocate, who appeared for the appellants before the arbitrator, abandoned the point arising

(1) (1855) 17 D. 613.
(2) (1883) 8 App. Cas. 623.
(3) [1896] 2 Q. B. 439.
(4) (1879) 11 Ch. D. 611.

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under s. 60 of the Railways Clauses Act, and said there was no question here of an accommodation road.]

There is no doubt that if the arbitrator has gone wrong in law it cannot be put right in this action; but the appellants submit that the submission or reference left the point under s. 13 of the special Act open.

[LORD WATSON mentioned *Mitchell* v. *Cable*. (1)]

Cripps, Q.C. (with him *Salvesen*, of the Scottish Bar), for the respondents. The only point reserved before the arbitrator was whether the question came within s. 90 of the Lands Clauses Consolidation (Scotland) Act. This access is not a road in the sense of the Railways Clauses Acts. It is part of the curtilage of the warehouse: *Marson* v. *London, Chatham and Dover Ry. Co.* (2) The fact that the access is used as such by two properties, to the owners of which it jointly belongs, does not cause it to be a road, because the joint owners might at any time agree to build upon it. The question put to the arbitrator was, could the portion in question be severed without material detriment to the remainder of the property; and he has answered that it cannot. That answer is binding on this House in this action: *Adams* v. *Great North of Scotland Railway*. (3)

EARL OF HALSBURY L.C. My Lords, various questions might arise in this case, and as to some of them I wish to reserve any opinion I might come to until they arise in the form in which it might become necessary to decide them. At present several of the questions argued before us here are not ripe for decision, because they do not arise.

The only point which arises here is whether or not in the first place this is a road within the meaning of the statute. The word "road" is used loosely, of course; the expression in the statute is "private road," which does import no doubt some kind of road over which there may be private rights which are not open to all Her Majesty's subjects; and dealing with that, speaking broadly, the legislation is, if a road is taken, or rather interfered with, which is the language of the statute, it must

(1) (1848) 10 D. 1297. (2) (1868) L. R. 6 Eq. 101.
(3) [1891] A. C. 31.

if possible be restored, or some substitution made. But the foundation of all the proceedings incident to that condition of things is that it should be a road within the meaning of the statute. I am very clearly of opinion that the piece of land in question here is not a road. The piece of land with which we are now dealing is part of the curtilage of the house: it is just as much part of the house as the hall. I think Lord Moncreiff uses the very language that I have adopted—that it is part of the vestibule of the house, and just as much part of the house as if it were a separate room in the house. It is true, here, that piece of ground is held by two persons in common. It is a right as between themselves that either could put an end to, I suppose, in pursuance of whatever arrangements they thought proper to make; or they might both convey it to somebody else, or use it for any purpose they pleased. It would be an abuse of language to describe that as a road any more than in the various cases which have been put in the course of the argument by various members of your Lordships' House, where it is suggested that a man's path going down his front garden, by means of which he gets down to his front gate, is no more a road than any other part of his house. In truth, it is not separated from the rest of his holding or the rest of his property. For convenience he may, if he pleases, together with his neighbour, use this for a particular purpose; but the rights of each of them go over the whole area. It is not a road, therefore, in any sense at all; and, therefore, under those circumstances, it appears to me that the question which would arise if it were a road within the meaning of the statute does not arise. My view therefore is, and I act upon that view, that it is not a road at all; and therefore the foundation of that part of the proceedings fails.

Then the next question is, assuming it not to be a road, whether or not the question which has been before the arbiter is finally decided by the decree arbitral. The question appears to have arisen under the limitations of the section of the Scottish Act corresponding to that in the English Act—ss. 90 and 92 respectively—which provide that where you take part of a house or other building which is within the protection of that statute

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you must take the whole of it. Now upon that subject I cannot forbear saying that these sections, which have introduced a new qualification to the general law as it existed for a great number of years—because occasionally a railway company has had to take a very small piece of something that was in no sense a house, or part of a house in the ordinary sense, and has been compelled to take the whole—have been regarded as somewhat of an abuse; and various private Acts have from time to time contained something to relieve them from that obligation. I cannot help saying that when these questions are considered in the Committees of either House it would be very well if the parties could provide for such a case as we have had before us, and could place definitely before the Committees of the House what they really mean to do; because I confess that, having looked at the two sections, specimens of which have been brought before us, I am wholly unable to understand exactly what the proviso means. The proviso is of a character which appears to enact one thing in the earlier part of it, and then to say it is not to operate in the remainder. That also is one of the questions, if it should ever become necessary to construe the proviso, upon which I wish to reserve my judgment. At present I throw it out for the consideration of the parties, and in the interest of all persons concerned in such questions as these, that it would be well if these sections in private Acts introduced as qualifications of the general law should be made intelligible, so that the parties should understand what rights they really have, and whether (to put it in a concrete form) a railway company taking part of a person's property in a case where there was undoubtedly deterioration caused to the remaining part of the property—but where the railway company could by proper arrangement minimise the amount of the injury they did—would be entitled to claim credit for that, and so to diminish the amount of compensation to be awarded. I think that would be a very sensible course of legislation, and I throw it out to the parties because this is a conspicuous example where it has been argued such a question has arisen. As I say, I reserve my opinion as to whether or not, notwithstanding the great obscurity in it, that could be successfully done under this

section. I think no one would doubt that, if there is such a power in the section as it stands, it might be made very much clearer by future legislation.

I come lastly to the question whether that point does call for decision here. As I say, I desire to reserve my opinion upon that point. I think it does not arise here; and for this reason, that the arbiter has done what by law he was entitled to do: he has received the evidence, he has considered the evidence, and he has decided adversely to the present appellants. I do not mean, for the reasons I have given, to express any opinion whether he was right or wrong in what he has done, because, whether he is right or wrong, the state of the law, as I understand it, is that we are not entitled to review his decision. The parties have selected him as the judge both of law and fact, and if he be ever so erroneous in the decision at which he has arrived it is conclusive upon the parties. Therefore, on that part of the case, I am not entitled to review the decision of the arbiter; his award is final, and, whether his award be right or wrong in point of law, it is a matter with which I am not entitled to deal.

Under those circumstances it appears to me that the appellants wholly fail here; and I move that the appeal be dismissed with costs.

LORD WATSON. I am of the same opinion upon all the points which it is necessary to decide in this case, because a number of questions have been argued before us which I think it quite unnecessary either to entertain or to give judgment upon.

At the outset of his argument it humbly appeared to me that the Lord Advocate had omitted to notice the fact that the Arbitration Act of 1889 is confined to England, and has no application to Scotland. If it had, I do not think it would be a national misfortune.

The first question which arises in the case is, whether this road, or piece of ground, which is included in the notice to take given by the company, is in the strict sense of the Railway Acts a road and nothing else. And the next proposition

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advanced by the appellants is, that being a road it is not, in the sense of the Lands Clauses Act, part of the entire property which is occupied by the respondents for the purposes of a warehouse. Upon that point, my Lords, I cannot say that I entertain any doubt. I think it is (though we do not use that expression in Scotland) part of the curtilage of the house. I think it is simply a part of the property which the owners at present by mutual consent find it convenient to use for the purpose of getting access to a street which abuts upon the property. And it being therefore an integral part of the property, the Caledonian Railway Company are within the ambit of s. 90 of the Lands Clauses Act.

Then, my Lords, the next point which it is necessary to consider is this: By the special Act of 1890, s. 13, s. 90 of the General Act is qualified to this extent—that the railway company may escape from its incidence if it be found that the ground as to which notice has been given "may be severed from the remainder of the property without material detriment thereto." That is a point which the arbiter has decided against the railway company, and I am not aware that any material objection has been offered to that finding beyond this —that in the course of his address to the arbiter the learned counsel for the company made this proposal: that the company should, in their use of the subject which they had given notice to take, confine themselves simply to passing a girder bridge across it at such height above the solum as would enable the owners still to use the ground, as an access to the street.

Whether the arbiter did right or did wrong in declining to take that circumstance into consideration in valuing the subject which notice was given to take, I do not think it necessary at present to make any comment beyond this—that the case of the *Oswald* v. *Ayr Harbour Trustees* (1) does not appear to me to have any application to the circumstances of the present case; and for this reason—that all that was there decided was that the undertaking which the public trustees were there tendering —an undertaking to bind their successors in office in all time to come—was one which the House held to be beyond their

(1) 8 App. Cas. 623.

power, and amounting practically to an abrogation of the rights given to those successors by express statutory enactment. Another question remains behind which I will not attempt to solve, although Lord Blackburn expressed an opinion favourable to the appellants upon that point, and the English case of Gonty seems to me to point in the same direction.

But the important question remains: Assuming that the arbiter went wrong, what jurisdiction has this House or the Courts below to interfere with his finding? My Lords, by the law of Scotland the oversman, who is appointed in the terms of the deed of submission, is made judge of law as well as of fact, and he is not liable to have his decision reviewed, reversed, or modified unless the parties undertake to shew—what has not been attempted here—either that he was guilty of misconduct in his office, or that he exceeded the bounds of the jurisdiction conferred upon him by the terms of the submission. In these circumstances I see no alternative except to assent to the judgment which has been proposed by the Lord Chancellor.

LORD HERSCHELL. I am of the same opinion. I think it clear that the plot of land in question was within s. 90, and that it was not a private road within the meaning of s. 49. On that point I shall add nothing to what has already been said.

Other questions have been argued before your Lordships which undoubtedly are of very considerable and general importance, inasmuch as they turn upon the construction and effect of a section which is to be found not in this particular private Act only, but in various other Railway Acts. The question is, What considerations the tribunal is entitled to take into account in determining whether the portion of land required for the purposes of the Act can be severed without detriment to the remainder? Can the arbiter or the tribunal, whatever it be, which has to answer that question take into account the actual use which it is proposed to make of the land taken by the railway company, and the rights which they are prepared to continue in respect of it, or to grant in respect of it, to the person whose land it was? My Lords, upon that point our attention has been called to a decision of the Court

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of Appeal in England. In my view, without expressing any opinion upon the decision in that case, it does not conflict, as has been supposed, with the case of *Oswald* v. *Ayr Harbour Trustees*. (1) I will not repeat, but I entirely give my assent to, the remarks which have just been made by my noble and learned friend Lord Watson about *Oswald's Case*. (1)

Another question arises with respect to the general Act, and that is, Whether in such a case as the present s. 68 is applicable, and whether therefore it was a case in which, under the provisions of s. 68, there was an obligation on the railway company to give access underneath the railway if they could do so? I do not express any opinion upon the construction of that section; I merely call attention to the fact that the section in question was the ground of the decision of one of the learned judges in *Gonty's Case* (2); and undoubtedly I do not think it can be disputed that, if what is suggested be the true effect of s. 68 (3), that would be an element to be taken into account in answering the question under such a provision as that contained in s. 13 of the private Act.

My Lords, as to all those points I reserve my opinion: I express no opinion upon them at the present time because it appears to me that they do not arise before this House, inasmuch as the arbiter, whether he has rightly decided or wrongly decided, is supreme. There is no power to review his decision whether he has made a mistake in law or whether he has made a mistake in fact; and consequently it is impossible for your Lordships to entertain most of the arguments which have been addressed to you on behalf of the appellants by the Lord Advocate.

LORD SHAND. I am of the same opinion, and I shall only add, in concurrence with the view expressed by my noble and learned friend on the woolsack, that it seems to me it would be desirable that those interested in such questions should endeavour to obtain legislation more clearly defined than in s. 13 of the private Act here—a section which, as I understand, is now com-

(1) 8 App. Cas. 623. (2) [1896] 2 Q. B. 439.
(3) English Act—Sect. 60 of the Scottish Railways Clauses Act.

monly inserted in many statutes—and to consider whether such a case as we have now had before us should not be specially provided for.

LORD JAMES OF HEREFORD. I concur in the view already expressed that this appeal should be dismissed, and I do so upon the two grounds which have been already mentioned: first, that it appears to me that this is not a road—it is part of the premises—it is really curtilage, and not road; and, secondly, for the reason just stated by my noble and learned friend Lord Herschell, that the decision of the arbiter is supreme, and we cannot review that decision either upon a point of law or of fact.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, February 22, 1898.

Agents for appellants: *Grahames, Currey & Spens, for Hope, Todd & Kirk, W.S., Edinburgh, and H. B. Neave, Glasgow.*

Agents for respondents: *Stibbard, Gibson & Co., for Boyd, Jameson & Kelly, W.S., Leith.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1898 *Feb.* 25.

MACFIE . . . . . APPELLANT;

AND

CALLANDER AND OBAN RAILWAY COMPANY AND OTHERS . . . . . RESPONDENTS.

(EX PARTE AS TO THE LORD ADVOCATE.)

Railways—Superfluous Lands—Land adjoining Terminus—Negotiations by Railway Company to Sell—Lease of Portion—Lands Clauses Consolidation (Scotland) Act, 1845 (8 & 9 *Vict. c.* 19), *s.* 120.

The directors of a railway company, before the expiration of ten years from the time limited by the special Act for the completion of their works, considered proposals for the purchase from the company of land adjoining one of their terminal stations, and after the ten years had expired they also considered proposals, and eventually leased a portion for the building of a district post-office. The adjoining landowner claimed the land as "superfluous land" within the meaning of s. 120 of the Lands Clauses (Scotland) Act, 1845:—

Held, affirming the decision of the First Division of the Court of Session, that whether the land had become superfluous or not was a question of mixed law and fact; and that on the evidence the land had not become superfluous.

London and South Western Ry. Co. v. *Blackmore*, (1870) L. R. 4 H. L. 610, distinguished.

APPEAL against an interlocutor of the First Division of the Court of Session (1) pronounced in an action of declarator instituted by the appellant, Robert Macfie, of Airds and Oban, to have it declared that two plots of ground marked A and B on a plan, and adjoining the Oban Station of the respondents, the Callander and Oban Railway, had become superfluous lands within the meaning of s. 120 (2) of the Lands Clauses

(1) 24 R. 1156; 34 S. L. R. 828.

(2) The head-line and s. 120 were as follows:—

"And with respect to lands acquired by the promoters of the undertaking under the provisions of this or the special Act, or any Act incorporated therewith, but which shall not be required for the purposes thereof, be it enacted as follows:

"120. Within the prescribed period, or if no period be prescribed within ten years after the expiration of the time limited by the special Act for the completion of the works, the promoters of the undertaking shall

Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 19, see s. 127 of the English Act); and that these plots of land had become vested in the appellants as from July 17, 1892. The ten years from the time limited by the Callander and Oban Railway Act of 1878 for the completion of the works authorized having expired on July 16, 1892. The Lord Advocate, as representing the Postmaster-General, was also a defendant, but did not take any active part in the case. The other respondents, the Caledonian Railway Company, were under obligation to perpetually work the Callander and Oban Railway, and became parties to the action at their own request.

It appeared that the two plots of land, with other lands, were compulsorily acquired from the appellant by the Callander and Oban Railway in virtue of their special Act (41 & 42 Vict. c. clxvii.); that by s. 36 the said railway company were authorized to complete their works on or before July 16, 1882; that on that date they had completed the construction of their line, the quay, sea-wall, and road authorized by the Act; that shortly after the Callander and Oban Railway Company took possession of the ground on which the plots A and B are situate they inclosed the said plots with railings, and converted them into ornamental grounds, running a street between the two plots; that the directors of the Callander and Oban Railway were negotiating for a considerable time for the sale of these lands; that there were offers given which were really declined because the price was not high enough, or because it was found that after 1892 a title could not be made. The respondents alleged the land was required for the railway undertaking.

The Lord Ordinary (Lord Low) gave judgment on March 3, 1897, substantially for the appellants, on the ground that a portion of plot A and the whole of plot B had been "stamped

absolutely sell and dispose of all such superfluous lands in such manner as they may deem most advantageous, and apply the purchase-money arising from such sales to the purposes of the special Act, and in default thereof all such superfluous lands remaining unsold at the expiration of such period shall thereupon vest in and become the property of the owners of the lands adjoining thereto in proportion to the extent of their lands respectively adjoining the same." In the English Act the similar clause was s. 127.

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with the character of superfluous land," although, on the question of fact, he thought the two plots would be required for the railway undertaking.

On July 16, 1897, the First Division unanimously recalled the interlocutor of the Lord Ordinary, and assoilzied the respondents from the conclusions of the summons.

On the hearing of this appeal, all their Lordships were of opinion that the judgment of the Lord President (Lord Robertson) in the Inner House set out clearly the circumstances with regard to the negotiations to sell the plots. The Lord President's judgment is therefore given here in full, as embodying all the material facts.

Opinion of the Lord President: "The pursuer's claim, as stated in the summons, is that, from July 17, 1892, the two pieces of ground in dispute vested in him; and the question at issue is whether, at that date, they were superfluous lands in the sense of the statutes. The summons purports to claim a declarator that, even if the lands did not become the property of the pursuer at July 17, 1892, at least they are now vested in him, and have become his property. No plea is stated on record, or has been stated in argument in support of any theory according to which the lands, if they were not vested in the pursuer at July 17, 1892, became vested in him at some later date. The sequel will shew that this observation is not unimportant. If the lands were superfluous at July 17, 1892, they vested in the pursuer, if at that date they were not superfluous, then the pursuer has no right to them.

"It may be convenient to consider, first, the condition and actual uses of the ground in July, 1892, apart from their potential uses, and the uses which have been projected for them. But the history of the ground bears upon both subjects.

"The terminus of the Callander and Oban line, at Oban, is situated close to the sea, and the land taken from the pursuer is the northmost or terminal part of the lands taken under their compulsory powers. The lands taken were not, however, ready to hand for the uses to which they have been applied. They consisted of rough ground, with the tide, at least in the part now in question, coming through the stones. The company

made up the ground, and used it when so transformed for their station. The land taken from the pursuer was accordingly used in part for the station buildings, and in part for the approaches to the station. In front of the station there was formed an open place. Instead of making the eastern approach to the station as wide as this place, the company made it a good deal narrower, leaving on either side the pieces of ground now in dispute. Of these, the one, A, is less than, and the other, B, is over a quarter of an acre. A is directly contiguous to the station building, and B is separated from A by the breadth of the roadway. Both A and B were laid out as ornamental grounds with accesses and broad footpaths. In the case of A, two of those foot-roads, forming what the pursuer's leading witness calls a very considerable part of the area, furnish access to the south-east portion of the station, and the wine or beer cellar of the refreshment-room. Those roads have been in use by the company for the purposes of the station since the grounds were laid out. Accordingly, at July 17, 1892, the condition of matters was this—both areas formed ornamental grounds, and A was further used to the extent of its roadways for access to the station. Those were not, of course, principal accesses, or used for other than subordinate purposes, but they were in fact accesses.

"I now inquire what were the potential uses of those lands to the railway company; and, of course, I disregard what is imaginary or conjectural or remote. We are to put ourselves in the position of business men looking around them in July, 1892, with a view not too sanguine and not too borné. Can we say that if all the facts existing on the last day of the ten years had been known to a reasonably skilful and careful person, he would have said at that time that the lands in question would, by the ordinary development of the railway or neighbourhood, be required to be actually applied to the purpose of the railway within a reasonable time: see *Hooper's Case*. (1)

"I do not think it necessary to elaborate this point, because the Lord Ordinary has indicated that, apart from the actings of the company themselves, he would hold that there was a

(1) (1880) 5 App. Cas. p. 18.

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reasonable probability of the ground being required for the extension of the station. In this opinion I concur. But as the effect to be given to the actings of the company may depend on the degree of strength of the evidence that the lands would, in reasonable probability, be needed for the active purposes of the company, I shall dwell on it for a moment.

"It is obvious to remark, and has frequently been remarked, that where pieces of land are small, and close to a station, and in a town, it is the more easily to be believed that they are 'required.' The patent facts about Oban and about this railway render these general considerations applicable with more, rather than less, than the average force. Further, it is proved that if the station and its accesses are ever to be enlarged by a foot, this ground is the only resource which the company has to draw on, and it is directly available for those purposes. Should such needs arise, then, on the assumption of the pursuer's success, this land would have to be bought back again. That such needs are likely to arise requires but little enforcement. The existing establishment was originally planned in accordance with the limited financial ability of the company at the time, and is in several respects contracted; and there is adequate evidence that for goods and parcel traffic, for refreshment-rooms and for offices, the present arrangements are already insufficient, if regard be had to present comfort and the expansion of traffic.

"Up to this point, what I have said is entirely in accordance with the opinion of the Lord Ordinary; and the next question is, Why has the Lord Ordinary come to the conclusion that the greater part of these lands were superfluous at July 17, 1892? The answer to this question of fact must be, Because, and only because, of the actings of the directors.

"I shall state briefly, and the matter admits of brevity, what I hold to be the facts as to the company's actings. Some of the propositions are negative—but these are not the least important.

"1. The directors never considered before, at, or after July, 1892, of what use the lands in question were, or were likely to become, to the company.

"2. The directors never came to any general resolution to sell A and B, or either of them. They only considered certain proposals for the sale of certain parts of them.

"3. In regard to A the directors did not, within the ten years, either resolve to sell or consider any proposal for the sale of any part of A.

"The only step taken in the direction of selling any part of A was after the expiry of the ten years, to wit, in August, 1892, when the secretary was authorized to state to the Post Office that a certain portion of A would be sold, the negotiations being continued till 1895, when the directors remitted to the secretary and solicitor to take the necessary steps for selling to the Post Office the ground specified in the Lord Ordinary's interlocutor. There was no concluded contract of sale, and the proposal was abandoned.

"4. In regard to B, the directors did, within the ten years, consider various proposals by Mrs. Campbell for the sale to her of parts of B. Those proposals were in each instance declined, on the ground of the proposed price being too small.

"5. No part of B was in fact ever sold; and none was let until 1895, when, after the falling through of the proposal for a sale of part of A, a certain portion of B was let to the Post Office for five years, and another portion of B was let to Mrs. Campbell for the same period.

"6. The pursuer has proved, as part of his case, that in 1892 a plan was prepared, at the instance of the company's officers, for utilising part of A for offices for the company, provision being made in part of the building for shops which might apparently be let.

"It is manifest from what has now been stated that the conduct of the executive of the defenders to a certain extent supports the contention of the pursuer. The actings of the directors, and the absence from the witness-box of several of the officers of the company who took part in those proceedings, have furnished the pursuer's counsel with material for legitimate comment. But it is necessary to see precisely what is the legal result of this conduct. Do the actings of the directors constitute a bar against the company now asserting the lands

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not to have been superfluous at July 17, 1892, or do they merely constitute evidence, more or less cogent, that the lands were in fact superfluous? Those two things are essentially different; but they meet, and I think are in danger of being confused, in a metaphor much used in the discussion—it is said that the company have stamped the lands as superfluous. (This phrase has come from an opinion of Lord Westbury's, in which it is used with precision as relative to estoppel.)

"Now, it cannot be disputed that the fact, e.g., that directors within the ten years resolved to sell, and only did not sell because the price was too small, is primâ facie cogent evidence that the land so dealt with was not required for the company's purposes. The reason for the inference is that the duty of directors being only to sell what is not required, it is to be presumed that before resolving to sell they have considered whether or not the land was required for the company's purposes, and had concluded that it was not. I say such a fact is cogent evidence; but it is not conclusive, and cannot possibly be so. Suppose that directors, tempted by a large price, resolved to sell the platform of a station or a siding in daily use, the proper inference from the resolution would be, not that the lands were superfluous, but that the directors had not known, or had not attended to, the legal limitations on their power to dispose of the company's property. Again, suppose the case to be less gross than that of a platform or a siding—the case of land, about which opinion might be divided as to whether it was or was not required—that the directors had resolved to sell, but that it appeared that they had so resolved in ignorance of the law which enables them to sell what is superfluous, but forbids them to sell what is required. In that case the cogency of the resolution to sell as evidence of superfluity is largely abated. It would merely come to this, that the directors thought that the money was more required by the company than the land. It would not prove that they thought that the company did not require the land. It is necessary here, and throughout the discussion, to beware of misusing the word 'required.' The question is not whether it would not be possible to get on without the lands, or whether by recon-

structing your station you might not so economise your ground as to leave this bit over.

"Now, as I have pointed out in my summary of the evidence, the directors of the defenders' company did not consider the questions properly arising when a sale of company's lands is proposed. Their proceedings shew clearly that they did not consider whether the land was or was not required, and shew also that they acted exactly in the same way after, as during, the ten years, although after the ten years they had no power to sell, the theory of the statutes being that after the ten years all that remains in the company is 'required.' In short, I think it is abundantly plain that they did not advert to the facts (and were never reminded or told) that directors can only sell land not required for the company's purposes, and that they cannot sell at all after the ten years. There is a very significant letter, dated August 31, 1893, from the secretary to the chairman, from which it appears that the law about superfluous lands was only unearthed after the ten years were out, and that on this occasion the wrong section was supposed to apply. All testimony harmonises with this view, although, for reasons easily conjectured, it does not directly affirm it.

"If, then, the actings of the directors be merely evidence on the question of fact, whether the lands were required or not, I hold that no legitimate inference can be drawn that the opinion of those persons was that the lands in question, if retained by the company, would not be required to be actually applied to the purpose of the railway within a reasonable time. If no such inference arises, then the conduct under consideration does not, as evidence, affect the question at issue. Even if, contrary to my opinion, an inference of opinion on the part of those persons that the lands were not required did arise, then I prefer the testimony of the very capable men who have given in the witness-box their opinions (and the reasons of those opinions) that the lands were required. And in regard to those parts of A which were and are actually used as accesses to the station, I prefer the facts to any opinions, proved or inferred.

"There remains the question whether the actings of the

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directors bar the company from maintaining that the lands are not superfluous. The way in which the question arises can best be seen by taking A and B one by one, for the facts are different.

"As regards A the Lord Ordinary proceeds solely on the abortive resolution to sell part of A to the Post Office in 1895. I think it quite clear from several passages in his Lordship's opinion that he treats that transaction as a bar, and not merely as evidence of superfluity. His theory leads to a very singular result, for he holds to be superfluous that part of A which was and is in actual use as an access to the station, while he allows the company to retain a large part of what was only used as ornamental ground, and his grounds for so distinguishing are that, as regards the latter, the company 'are not estopped by their actings from pleading that the portion of A not included in the sale to the Post Office was not at the end of the ten years superfluous,' and that that ground is available for an office or a second refreshment-room. It is most remarkable that the pursuer has acquiesced in the Lord Ordinary's interlocutor. He is therefore acquiescent in the view that about one-half of A is not superfluous. Now, when an area of less than a quarter of an acre is reduced by one-half, and it appears that of this remaining fraction a large part is admittedly in use for access, the argument becomes pretty thin.

"There seem to me to be at least two fatal objections to the theory of bar as regards A. The one is that the resolution to sell was come to after the expiry of the ten years; and the other is that no sale was made.

"1. The law, as I understand it, is that at the end of the ten years, i.e., on July 17, 1892, the lands either vested or did not vest in the adjoining proprietor. If at that date the lands were not required by the company, they vested in the pursuer; if they were required, then they did not vest in him, and his interest in them for ever came to an end. Of course, on the question of fact, light may be got from the sequel of events; and therefore what was done in 1895 may throw light on the state of things in 1892. But the hypothesis of the present question is that, taking all evidence into account, the lands

were 'required' in 1892, and the argument is that the company are barred, in a question with the pursuer, from pleading the fact. To my thinking that hypothesis involves that in 1895 the pursuer had no right which could be affected by anything which the company could do, and that the actings of the company could not revive a right which from July 17, 1892, was dead and done with. The argument would be exactly the same if the abortive resolution to sell had been in 1995 instead of 1895, only that in that case the unsoundness of the pursuer's plea would be more open and palpable.

"2. The second point to which I call attention is, that the resolution to sell was departed from, and no sale took place. In his interlocutor the Lord Ordinary uses the words, 'which the directors agreed to sell' to the Postmaster-General; but it must be observed that no contract of sale was concluded with the Postmaster-General, no acceptance of his offer having been sent. The fact was that the directors, having instructed their officers to carry out the sale, were told by these officers that the sale could not go on; and it was no further proceeded with.

"Now, I cannot hold that the mere private fact that directors resolve to sell, although they immediately after abandon or rescind their resolution, can bar them from saying and proving that the lands were required. Suppose the directors were told by one of their local officials that they ought to sell the lands, and, too readily accepting his advice, remitted to their officers to carry out the sale, and then were told by return of post, by the head engineer, that this would never do, that they would require the lands next year, and the idea of sale is abandoned. The pursuer's contention involves that the ill-advised resolution is final, in a question with the adjoining proprietor, although he never heard of it till after he claimed the lands. Such a theory seems to me entirely unsupported by principle.

"The Lord Ordinary seems to have been much influenced by the case of *London and South Western Ry. Co.* v. *Blackmore* (1); and indeed he has really decided the case in consequence of certain remarks of Lord Westbury in that case.

(1) L. R. 4 H. L. 610.

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Now, it has to be observed, first, that, on the facts, *Blackmore's Case* (1) was the case of a sale, and not of a projected or contemplated sale; secondly, that the claim was by a person having a right of pre-emption under what in the English Act is s. 128 (and in the Scotch Act s. 121); thirdly, that it was the case of a sale within, and not after, the ten years; fourthly, while Lord Westbury speaks of the act of the directors in putting up the lands for sale as stamping the lands with the character of superfluous lands, and estopping the directors, he says that this had been decided, and expresses his own personal opinion merely by saying that he is by no means inclined to disagree with the decision. We were told, and I suppose accurately, that the decisions referred to were *Lord Carington's Case* (2) and *Lord Beauchamp's Case*. (3) If Lord Cairns' judgment in *Carington's Case* (2) be referred to, it will be found that he rests his conclusion on the fact that the company had not still retained possession of the land, but had sold it to another. In *Lord Beauchamp's Case* (3) the judgment on this point is rested on the authority of *Rangeley* v. *Midland Ry. Co.* (4); and I am unable to find in the report of that decision anything which bears upon the present question. I am not prepared, therefore, upon the somewhat indirect and inconclusive authority which I have stated, to give effect to a plea which seems to me unsupported by the principles of our law of bar.

"The case relating to B may be more briefly discussed. As already stated, what occurred within the ten years was merely the consideration and ultimate rejection of offers to purchase. As regards these, in my view they enter the question only as items of evidence; and the observations apply which have already been made in relation to A. The leases given in 1895 to the Post Office and Mrs. Campbell can hardly be regarded as inconsistent, by reason of their duration, with the view that ultimately, and at no distant time, the lands will be required for railway buildings. The temporary use in each case is appropriate to the general idea of railway interests

(1) L. R. 4 H. L. 610.
(2) (1868) L. R. 3 Ch. 377, 382.
(3) (1868) L. R. 3 Ch. 745.
(4) (1868) L. R. 3 Ch. 306. This case was cited in the report by error.

being continuously furthered; for it cannot be doubted that the convenience of the Post Office is to a certain extent the convenience of the railway, while Mrs. Campbell's possession of the rest of the area as garden-ground ensures the continuance of the embellishment of the station.

"My opinion upon the whole matter is that the Lord Ordinary's interlocutor should be recalled, and the defenders assoilzied from the conclusions of the summons. In this view I have had no occasion to consider the separate plea of the Caledonian Railway Company."

In this judgment the rest of the Court (Lords Adam and Kinnear) concurred.

1898. Feb. 22, 24, 25. *Asher, D. F.* (of the Scottish Bar), and *Cripps, Q.C.* (with them *Dumas*), for the appellant. The Lord Ordinary was right in holding that the Callander and Oban Railway Company had by their conduct "stamped" the whole of plot B, and that part of plot A which they were willing to sell to the Post Office authorities, as superfluous land. And the appellant now claims that portion of plot A and the whole of plot B as having vested in him. The sales only fell through either because enough was not offered, or in the case of the Post Office it was found no title could be made after July 16, 1892; and it was then that the company leased a portion of plot B to the Post Office authorities. The period to be looked at to test the character of the lands is the ten years after the expiration of the time limited by the special Act for the completion of the works, unless the company shew earlier that they regard the lands as superfluous. In *London and South Western Ry. Co.* v. *Blackmore* (1) it was decided that if the directors within the ten years make the attempt to sell, the right of the adjoining landowner to claim the benefit of pre-emption at once arises under s. 128 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), similar to s. 121 of the Scottish Lands Clauses Act, 1845. Here from the date of the completion of the Oban Station—1881—the lands in question have been treated as over and above the company's requirements: the station

(1) L. R. 4 H. L. 610, at p. 624.

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did not admit of expansion in the direction of these plots, and in no way were they required for any proper railway purpose. That the directors were willing to sell is "most conclusive" that the lands are and were superfluous: see Lord Hatherley L.C. in *Blackmore's Case*. (1) It is immaterial that the railway company did not carry through a sale before or after the ten years had elapsed. That they were ready to sell is sufficient; and they are now debarred from saying that the lands are not superfluous, but are required. Secondly, the Callander and Oban Company's actings are such cogent evidence of these being surplus lands, that strong and specific evidence that they were required for the railway should be forthcoming; but none of the directors of the Callander and Oban Railway except one, nor their secretary who negotiated the sale, were examined. As to the contention of the respondents, the Caledonian Railway Company, that they, being the workers of the railway, were entitled to be consulted before any land was dealt with as superfluous land: by common consent of the two companies these plots remained under the control of the Callander and Oban Railway. We contend that if within ten years the company expose the lands for sale they cut off their right there and then to retain the lands for even the unexpired period, and the attempt during that period and after, equally caused the adjoining owner's right to accrue.

[LORD HERSCHELL. They entertained proposals, but did not offer.]

They cannot, after considering the offers, be heard to say that these plots are not superfluous lands: see *Lord Beauchamp* v. *Great Western Ry. Co.* (2) and *Lord Carington* v. *Wycombe Ry. Co.* (3) In the latter case Lord Cairns said: "The railway company have themselves stated that it is superfluous land, and cannot now dispute the fact." That is, that one cannot go behind that declaration of the company. *Stockton and Darlington Ry. Co.* v. *Brown* (4) shews the weight given to the opinion of the company's directors in these cases.

(1) L. R. 4 H. L. 610.
(2) L. R. 3 Ch. 745.
(3) L. R. 3 Ch. 377, at pp. 382-4.
(4) (1860) 9 H. L. C. 246.

[They also referred to *Mulliner* v. *Midland Ry. Co.* (1), *Great Western Ry. Co.* v. *May* (2), and *Hooper* v. *Bourne*. (3)]

[LORD HERSCHELL mentioned *Betts* v. *Great Eastern Ry. Co.* (4)]

A. Graham Murray, L. A., Cozens-Hardy, Q.C., and *Clyde* (the first and latter of the Scottish Bar), for the respondents, were not called upon.

EARL of HALSBURY L.C. This case has occupied your Lordships for a considerable time; but I confess I have come to the conclusion without the smallest doubt that the interlocutor appealed from is well founded, and ought not to be disturbed.

My Lords, I do not think that it would be possible to put in more terse and vigorous language the grounds for the conclusion at which I have arrived than they are put in the language of the Lord President in his judgment, which appears to me with great accuracy and precision to have met every point. In particular I notice how admirably he has pointed out the difference between that which is evidence and that which is conclusive as an estoppel or bar. My Lords, that seems to me to dispose of the whole of this case. If the Lord President's reasoning is as right as I think it is admirably expressed, the question of fact has been determined unanimously by all the judges who heard the case, because as to the Lord Ordinary (although I think his Lordship took an erroneous view as to how an estoppel could have been created or a bar could have been made under these circumstances), as to the question of fact he was entirely in accord with the rest of the judges. Therefore upon this question of fact, so far as it is a pure question of fact, I think I may say the unanimous judgment of the Court below was a very satisfactory one, and certainly it was one to which I should myself have come.

With respect to the reasoning of the Lord President, if we are entitled to look at the facts, and not begin to split straws about what may or may not be the right of a railway company

(1) (1879) 11 Ch. D. 611.
(2) (1874) L. R. 7 H. L. 283, at p. 285.
(3) (1877) 3 Q. B. D. 258; (1880) 5 App. Cas. 1.
(4) (1873-8) L. R. 8 Ex. 294; 3 Ex. D. 182.

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in respect to this or that little piece of land adjoining a station —if (I say) we are entitled to look at the facts, as the Lord President's judgment shews that we are entitled to look at them, I should come myself to exactly the same conclusion as all the other learned judges have done. I do not wish to add anything to what the Lord President has said in his judgment, either upon the law or upon the facts, for I should despair of putting it more clearly, tersely, or ably than he has done.

I therefore move your Lordships that this appeal be dismissed with costs.

LORD WATSON. This appeal, in my opinion, raises only one substantial question, which involves law as well as fact, namely, whether the plots claimed by the appellant as adjoining proprietor under s. 120 of the Lands Clauses (Scotland) Act, 1845, were or were not, at the date when the period of ten years expired, superfluous lands within the meaning of that clause. Although it is a mixed question of fact and law, the legal question which it involves appears to me to be an exceedingly simple one. The question of fact may be attended with some nice considerations—indeed, the question of fact is the only one which, to my mind, is attended with the least nicety. The issue of fact raised is simply this—whether at the expiry of the decennial period these two plots were land which had become requisite for the purposes of the company, or would in all probability become necessary within a reasonable time after that date. If either of these propositions be answered in the affirmative, there is an end to the appellant's case, because in that case, that the lands would not be within s. 120 does not appear to me to admit of dispute. On the contrary, if we ought not to affirm either of them, the result would be equally plain in favour of the appellant.

I am perfectly satisfied with the terms of the judgment of the Lord President delivered on behalf of the First Division. I concur in the way in which he deals with the so-called question of estoppel. I do not always understand the meaning of that word in a Scottish case; but all that I can say about it is, that in this case the plea in my opinion is inapplicable and

is most certainly unwarranted by authority. I do not mean to say that it has not been supported by a citation of so-called authorities: it has been largely so supported; but, in my opinion, those authorities have no bearing upon the point.

I therefore concur in the judgment that has been moved.

LORD HERSCHELL. I am of the same opinion.

Treating the question as one of fact, I see not the slightest reason to dissent from the conclusion at which I understand all the judges to have arrived—that these lands were within the meaning which this House has placed on the words of the section, "lands required for the purposes of the undertaking."

The only point which really gives rise to any question of law is whether the steps taken by the directors in this case can be regarded as precluding the company from now insisting that the lands are required. I think for the reasons which the Lord President has given that there is no such bar to their insisting upon that case now. I only desire to add one word with regard to the English authorities which were supposed by the learned Lord Ordinary to support a contrary conclusion.

The case of Blackmore, which was chiefly relied upon for certain expressions used by Lord Westbury, does not appear to me to be relevant, and for this reason—that there was no controversy there as to the lands being superfluous. The only controversy there was this: At what time did the right of pre-emption arise? Was it postponed in all cases until just before the ten years expired? Had the company in all cases the right to postpone the question until then, or, if they in fact sold the piece of land as superfluous, did that entitle the person from whose land the piece in question had been severed to insist that he should then have a conveyance to him, the price being ascertained in the manner provided by the Act? My Lords, that depends, not upon the construction of the section with which your Lordships have to deal, but upon the construction of the following section, which provides that before disposing of land they shall offer it to a certain person. In that case they had actually disposed of the land—they had sold it to a purchaser. The person entitled to pre-emption then said, "You have sold

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this land to a purchaser; you have disposed of it without giving me the offer to purchase which the statute says you are to give." The decision was that under those circumstances he was entitled to be put in the same position as if before so disposing of it they had made an offer to him—in which case, of course, the sale would have taken place at that time. That was the decision in Blackmore, and nothing more. It did not in the least determine that even in England, under our doctrine of estoppel, there would have been anything to prevent the company at the end of the ten years, by reason merely of any steps that they had taken, from saying that the lands were "required for the purposes of the Act."

My Lords, the same remarks really apply to the other cases relied upon. Perhaps the expression "stamping the lands" with the character of superfluous lands has given rise to the misapprehension under which, I think, the Lord Ordinary laboured. It is not a very happy expression, because it seems to me it would not necessarily so stamp them at all times and for all purposes and under all circumstances. One must take the expressions used in relation to the question that was then before the House.

For these reasons, my Lords, I add nothing more, because I am thoroughly satisfied with the judgment of the Lord President.

LORD SHAND. I am also of the same opinion, and the only additional observation I think it necessary to make is in regard to the ground on which it appears that the Lord Ordinary in his judgment differed from the view ultimately taken by the First Division of the Court.

It seems to me to be clear, my Lords, that at the end of the ten years, in 1892, the land in question was required for railway purposes. We have a body of evidence which preponderates greatly over that of the pursuer's to shew that at this terminal station there is a very small amount of spare land, and, from the testimony of a number of the officials of the company, it is, I think, proved that it would really have been folly to have given that land away—that the station itself is

contracted, that more accommodation is required there, and that there is the prospect of large additional traffic coming in. Therefore, I am satisfied that the land at the end of the ten years was in point of fact required for railway purposes. The judges who have dealt with the case, the Lord Ordinary and the learned judges of the Inner House, are entirely of the same opinion.

It is true (and that has raised some difficulty in the case) that it appears that the directors were for a considerable time negotiating for the sale of part of this land; that there were offers given, and that these offers were declined, not because the directors thought the lands were required for the purposes of the undertaking, but because the price offered was not high enough. I have felt the difficulty of that circumstance upon the question of fact. I think the pursuer may well say that the inference to be drawn from the way in which the directors conducted these negotiations was that they regarded this land as superfluous; but although that appears to have been their view, I do not think the company is now precluded from maintaining, what appears in the light of the evidence adduced on the whole to have been the fact, that this was a mistaken view, and that the ground was and is really required for railway purposes.

In regard to the different view which was taken by the Lord Ordinary, founded, I think, upon the case of Blackmore, I entirely concur in what has fallen from my noble and learned friend Lord Herschell. In *Blackmore's* case, it is to be observed that s. 121 was the section with which the Court had to deal, and not the section with which we are here concerned. In the next place, it appears that in that case both parties were agreed that the land was superfluous, whereas here we have the parties directly in controversy upon that subject; and in the case of Blackmore not only had the directors taken the view that the land was superfluous, from which indeed they did not depart in the litigation, but in point of fact they had gone on and actually sold the land. In these circumstances, it appears to me that that case can be of no authority for the present case; and I agree with what has been observed by the

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Lord President, and with what has been indicated by my noble and learned friend who has last spoken, that the Lord Ordinary has attached rather too great importance to the use of the word "stamping" in the judgment of Lord Westbury, an expression which may be said to have been somewhat stronger than the case required, and which is inapplicable to the circumstances here in considering the effect of a different section of the statute.

Agreeing as I do with your Lordships in thinking that the reasons for the judgment have been exhaustively, clearly, and satisfactorily stated in the able opinion of the Lord President in this case, I concur in thinking that that judgment ought to be affirmed.

Appeal dismissed with costs.

Lords' Journals, February 25, 1898.

Agents for appellant: *Martin & Leslie, for Finlay Daniel Morrison, Writer, Greenock, and Finlay & Wilson, S.S.C., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for H. B. Neave, Glasgow, and Hope, Todd & Kirk, W.S., Edinburgh.*

[HOUSE OF LORDS.]

HUTTON . . . . . APPELLANT;

AND

ANNAN AND OTHERS . . . . . RESPONDENTS.

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Trustee — Investments — Judicial Factor — Curator bonis — Real or heritable Security — Municipal Corporation Rates — Harbour Rates — Trusts (Scotland) Amendment Act, 1884 (47 & 48 *Vict. c.* 63), *s.* 3, *sub-ss.* 10, 12 — *Judicial Factors Act*, 1849 (12 & 13 *Vict. c.* 51), *ss.* 4, 13.

The accountant of court, Scotland, who, as to this matter, fills a similar position to that of a Master in Chancery under the Judicial Trustee Rules, 1897, has no power to approve of an improper investment.

By s. 3, sub-s. 10, of the Trusts (Scotland) Amendment Act, 1884, trustees, including judicial factors and curators bonis, are authorized to lend trust money in loans on real or heritable security; and by sub-s. 12, in loans on debentures secured on rates or taxes levied under statutory power by municipal corporations.

A curator bonis invested his ward's money on a bond of the Greenock Harbour Trustees, a corporation consisting of the magistrates, the council, and elected trustees. As security, the trustees assigned to the curator bonis the "rates and duties and other revenues of the harbour," but no right of obtaining possession of the works on default of payment was given. The accounts of the curator bonis were audited by the accountant of court and passed without comment. The harbour trustees made default in payment of interest.

Held, (1.) that the investment was not a real or heritable security; (2.) that it was not a debenture created by a municipal corporation; (3.) that, looking to the previous statement of accounts of the harbour trust, it was not a security a prudent trustee ought to have invested his ward's money in; and (4.) that the annual audit of the accountant of court did not exonerate the curator bonis from liability.

APPEAL from the First Division of the Court of Session, Scotland.

The question was whether James Hutton, chartered accountant, Glasgow, was bound to make good to the estate of Jessie Annan, a minor, one of the respondents, a sum of 1750*l.*, which, as her factor loco tutoris or curator bonis, he had lent to the Greenock Harbour Trustees upon the security of a bond and assignment of the "rates, duties, and other revenues of the harbour trust."

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Jessie Annan being a minor, this action was raised, with the advice and consent of her mother, for declarator that the loan was ultra vires of the appellant as curator.

The appellant was appointed, as stated above, on January 21, 1885, factor loco tutoris to Jessie Annan, then aged about two years; and in the following February he lent the sum of 1750*l.* on the above-mentioned bond in his name as factor loco tutoris to Jessie Annan. The bond declared that subject to the provisions of the said Acts, namely, the Greenock Port and Harbour Acts, 1866, 1867, 1872, 1880, and 1884, "the trustees" (of the Greenock Port and Harbour) "do hereby assign and make over to the said James Hutton, his executors and administrators or assigns, as factor aforesaid, all sundry the rates, duties, and other revenues of the trust payable to the trust in virtue of the said Acts, and all their right, title, interest of, in, and to the same, to be held by the said assignee and foresaids until the said sum of 1750*l.*, with interest thereof, shall be duly satisfied and paid."

The assignment did not assign in security the works and property of the trust; and the appellant's only remedy for enforcing payment of interest and principal was by the appointment of a judicial factor to receive the rates and duties and other revenues of the trust.

The statutory history of the Greenock Harbour Trust seems to be as follows: The 13 Geo. 3, c. xxviii., conferred authority on the magistrates, or bailies and town council, of Greenock to deepen the harbour and build piers, and to borrow money for these purposes with power to levy rates. By 43 Geo. 3, c. lxxxvii., the erection of other harbour works was authorized, and s. 21 provided that the accounts and funds of the town were to be kept distinct from those of the trustees for the improvement of the harbour. Then by 3 & 4 Vict. c. xxvii., the provost, four bailies, the treasurer, the whole councillors, together with nine feuars or sub-feuars of the town, were appointed trustees for the purposes of the Act, and by s. 11 all the property and management covered by the respective Acts were transferred to them. By 5 & 6 Vict. Sess. 2, c. liv., new trustees were appointed to administer the harbour and port of Greenock.

These new trustees were the provost, the four bailies, the treasurer, and the whole other councillors of Greenock, and their successors in office. The Act raised the borrowing power of the trustees to 220,000*l.*, and enacted that the trustees might assign the rates, duties, and properties of the trust, or any part thereof, in security of sums borrowed.

In 1866 a change was made in the administration of the harbour of Greenock. By 29 & 30 Vict. c. clvi., a new constitution was given to the trust. Sect. 6 enacted that the provost, four bailies, the treasurer, and the whole other councillors of Greenock, and their successors in office, and nine persons to be elected in manner described by the Act, should be the trustees of the port and harbour of Greenock, and should be a body corporate under that name. The Act by other sections provides for the election of trustees by shipowners and ratepayers, with a view of providing a representative board. By this Act power was conferred on the trustees to borrow further money for the improvement of the harbour, and the maximum rates payable on vessels, goods, and for use of cranes, graving-docks, &c., were fixed. Under the form of assignment for securing the sums borrowed, the trustees assigned only the rates, duties, and other revenues of the trust, and not the undertaking itself. Further borrowing powers were conferred by an Act of 1867, and by an Act passed in 1872 the borrowing powers were raised to 1,000,000*l.* sterling. Under the latter Act a form of assignment was given by which the works and property of the trust, as well as the rates, duties, and revenues, were assigned to the lenders. Additional borrowing powers were given by subsequent statutes, and notably by an Act of 1884, under which the loan in question was made. No alteration, however, was made upon the constitution of the body of trustees incorporated under the 1866 Act.

The loan made by the appellant was duly entered as an investment of the tutorial funds in an account lodged by him, under s. 13 of the Judicial Factors Act, 1849 (called sometimes the Pupils Protection Act) (1), for the year ending March 31,

(1) Sect. 13 of the Act 12 & 13 Vict. c. 51 enacts, "That the accountant shall see that the factor's accounts of charge and discharge, with the

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1886, with the accountant of court, and no objection was taken by the accountant of court to the investment. Similar accounts were lodged March, 1887, and March, 1888, and after examination were passed by the accountant of court. After the event to be presently mentioned, the accountant of court, on the account dated March 31, 1889, made the following note, with reference to the investment of the 1750*l.*: "When the date of payment arrives this bond should be realized. Meantime all questions are reserved." It appeared that shortly before Whitsunday, 1887, the Greenock Harbour Trust was found to be unable to meet its liabilities, and the usual half-yearly dividend was not paid. And on May 11, 1887, the Greenock Harbour Trust was declared to be insolvent. Thereafter, differences having arisen as to the respective preferences of the various bondholders under the different Acts of the trust, a special case was remitted to the First Division, and a decision given fixing the priority of the bondholders: see *Greenock Harbour Trustees* (1); and following on that judgment a special Act, the Greenock Harbour Act (51 & 52 Vict. c. cxiii.), was passed, which authorized the trustees to create and issue stock in lieu of the existing harbour securities. The appellant under the above decision and Act was obliged to accept certain B deben-

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vouchers thereof, are duly lodged, and shall thereafter examine the same without undue delay, and audit the account on the general principles of good ordinary management for the real benefit of the estate and of those interested therein, and he shall consider the investments of the estate and the sufficiency thereof, and he shall be entitled to require from the factor all necessary information and evidence, and he shall fix the amount of the factor's commission for the period embraced by the audit, according to his opinion of what is just in each particular case, and he shall strike the balance, and shall state the result of his audit in the form of a short report, and if he has made any corrections on the account, he shall, if required by the factor, explain such corrections, and his reasons for making them." [See Judicial Trustee Rules, 14, 15, 33 of 1897.]

Sect. 17 enacts that, either at the termination of the factory or during its subsistence, it shall be competent for any person beneficially interested in the estate to make appearance and upon cause shewn to open up the audit of all accounts which have been audited by the accountant in the absence of such party.

Sect. 34 enacted that the factor's accounts could be opened up on the factor presenting a petition to the Court for his discharge.

(1) (1888) 15 R. 343.

tures in place of his bond, the A debentures having priority. The Act of 1888 contained a clause that judicial factors, &c., and trustees might take the debentures, but it did not state this power was to act retrospectively. Interest at a reduced rate has been paid on the new debentures, but the value of the stock had fallen to about 38 per cent. Evidence was produced that the Greenock Harbour Trust bonds stood high in the public estimation, and that before the default the appellant could have sold at par. The account of the trust shewed that some years before 1885 the revenue had been falling, and also that very heavy expenditure for a new dock had been undertaken: for this see Lord Herschell's opinion.

The Lord Ordinary (Lord Kyllachy) gave judgment against the appellant, not on the ground that the loan was not within the class of investments open to judicial factors, but on the ground that in the circumstances the evidence shewed that the appellant had failed to exercise due care in selecting the investment. The First Division, by interlocutor dated May 14, 1897 (1), adhered to the Lord Ordinary's judgment with the variation that the words "in the circumstances" be deleted. Their Lordships held that the investment was not one of the class of investments which a judicial factor was entitled to make; secondly, that the fact that the investment was passed without objection by the accountant of court did not protect the appellant if the investment was ultra vires; and, thirdly, that even if the investment was within the powers of the appellant, the security was insufficient owing to the absence of a proper margin; and their Lordships referred to their opinions in *Cowan's Trustees* v. *Ferrie's Curator Bonis* (2) as governing this case.

1898. Feb. 25, 28. *Balfour, Q.C.* (of the Scottish Bar), and *Haldane, Q.C.*, for the appellant. A curator bonis or judicial factor is an officer of the Court; and, taking along with that, that there were annual audits (ss. 4 and 13, 12 & 13 Vict. c. 51), these judicial trustees—who take charge of the interests of their wards under the Court and not under the will of any

(1) 24 R. 851. (2) (1897) 24 R. 590.

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testator, with the object of acting for the best interests of their wards—were well warranted in placing their ward's money on a class of security analogous to securities sanctioned by the Court in earlier cases: see the security sanctioned in *Grainger's Curator* (1) and *Lloyd's Curator*. (2) The accountant of court is, as it were, the hand of the Court; he has under his eye every year the factor's accounts, and, here, if he had questioned this investment at the first or second audit, the appellant could have sold it out at par. The same hard and fast rule which governs ordinary trustees does not govern judicial factors. It must also be remembered that the Trusts (Scotland) Act, 1884, is an amending Act, and has not repealed the law laid down in *Grainger's Curator*. (1)

Secondly, the investment was an investment on heritable or real security, and so, both within the common law and s. 3, sub-s. 10, of the Trusts (Scotland) Amendment Act, 1884, "trustees under any trust may, unless specially prohibited by the constitution or terms of the trust, invest the trust funds—in loans—on real or heritable security in Great Britain." Now the Greenock Harbour bond was a charge over incorporeal rights, and payment could be enforced by the appointment of a judicial factor, who would enter into possession of the harbour and docks, and receive the rates or profits of the harbour. That power to reap the fruits or rent of the harbour shewed it was a real security: *Breatcliff* v. *Bransby's Trustees* (3); *Haldane* v. *Rushton*. (4)

Thirdly, it was an investment sanctioned by sub-s. 12 of s. 3 of the above-cited Act, under which "trustees may invest" "in loans," "on bonds, debentures, or mortgages, secured on rates or taxes levied under the authority of any Act of Parliament by municipal corporations in Great Britain authorized to borrow money on such security." It is submitted, having regard to the constitution of this harbour trust, that the trustees of the port and harbour of Greenock constituted a municipal corporation within the meaning of the Act.

Fourthly, the investment was a sufficient investment. The

(1) (1876) 3 R. 479.
(2) (1877) 5 R. 289.
(3) (1887) 14 R. 307.
(4) (1881) 9 R. 253.

new dock was an absolute necessity, the existing accommodation being perfectly unequal to meet the requirements of the shipping; and it would have been a success but for the change of trade in sugar and timber. There was no doubt that the revenue had declined before the date of the investment, but that might occur to a railway company. The default was a great surprise to everybody, the public having a very high opinion of the security; and the appellant was examined, and testified that he was certain that the new docks would be a success, and that he acted throughout in the most perfect good faith.

A. Graham Murray, L.A., Shaw, Q.C., and *Orr Deas* (all of the Scottish Bar), for the respondents, were not called upon.

LORD HERSCHELL. In this case the question involved is whether the appellant has rightly been made responsible for the investment of a sum of 1750*l.* in the bonds or debentures of the Greenock Harbour Trust. He was appointed originally in January, 1885, factor loco tutoris to one Jessie Annan, and in that year he made the investment in question. It turns out now that the Greenock Harbour security is not sufficient to safeguard the capital investment, and that the payment of interest also ceased some years ago owing to the large indebtedness and the diminished income of the Greenock Harbour Trust.

It is alleged on behalf of the appellant that the investment in the Greenock Harbour bonds was authorized by the terms of the Trusts (Scotland) Amendment Act, 1884. Two of the provisions in s. 3 of that Act were relied upon. It was said that the investment was one "on real or heritable security in Great Britain." The Court below have held, contrary to the impression of the Lord Ordinary, that this was not an investment "on real or heritable security." It appears that the opinion was expressed by the Lord President, and concurred in by the other judges of the Court of Session, as far back as the year 1888, that loans upon bonds of this very harbour trust of which we are now speaking were not loans upon real security. Reliance has been placed upon the views expressed by the Court of Session in *Breatcliff's Case* (1) with regard to a loan upon

(1) (1887) 14 R. 307.

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debentures of the Port Girvan Railway. That case appears to me to be essentially distinguishable from the present. I need say no more about it than that. In the present case the undertaking is in no way conveyed as part of the security: the only security is an assignment of the dues, rates, and receipts of the harbour trust. In case of a failure to pay the interest, there is a power to appoint a judicial factor who has the right to enter into the receipt of those payments. Beyond that, however, there is no power given: there is no power to take possession, and there is no assignment of the undertaking. It seems to me, under those circumstances, that it is impossible to assert that the loan in the present case was a loan "upon real security."

Then it was argued that the loan was authorized as being upon bonds or debentures "secured on rates or taxes levied under the authority of an Act of Parliament by a municipal corporation." I think it is equally clear, or perhaps still more clear, that the present case is not within those words. This was not a loan upon rates or taxes within the meaning of that sub-section. The word "rate," no doubt, is used in relation to the payment by the ships that used the docks for the services rendered to them and the accommodation afforded; but that, in my opinion, is not a "rate or tax levied under the authority of an Act of Parliament" within the meaning of the sub-section, nor can it be said in the present case, even if it were, that it was levied by a municipal corporation. The rates are rates which the harbour trustees are authorized to take. The fact that the members of the corporation, or the corporation itself, formed a part of the harbour trust, in which certainly were included some who were not members of the corporation, seems to me not to establish by any means that these rates were levied by a municipal corporation, even if, as I have said, they were rates within the meaning of the sub-section, which I think they are not.

Then it is next said that, quite apart from the provisions of the Act of Parliament, there is no rigid and inflexible rule which confines the investments by a judicial factor to investments of the classes authorized in the Act of 1884, and that before that year at common law it had been laid down that a

judicial factor was not to be rigidly limited within the class of securities which can be properly denominated real securities. Two cases were relied upon to establish that proposition. The first (1) was a case in which it was held that the Court would sanction an investment by a judicial factor upon loans to the county authority in Aberdeen upon the security of certain rates which they were authorized to levy. Undoubtedly that was very closely analogous to a loan upon real property, and it seems to me to be a sanction of a class of security wholly different from that which your Lordships have now to consider. In the other case (2) sanction was given to a loan upon debentures of the Caledonian Railway Company, That is a class of security which has since been expressly authorized by Act of Parliament. In the present case it is said that the security of dock rates is analogous to the security of railway receipts. It by no means follows that because the Court sanctioned in *Lloyd's Case* (2) investments in debentures of the Caledonian Railway Company—a class of investments since authorized by the Legislature—every investment in an industrial undertaking is therefore to be regarded as a proper security for the investment of money by a judicial factor. If we were dealing with a case of an investment upon railway debentures it might be said that the Court had shewn by the decision in *Lloyd's Case* (2) that that was a security in which if prudence were displayed a judicial factor might invest without complaint, But we are not dealing with that; we are dealing in the present case with the bonds or debentures of the Greenock Harbour Trustees, and no case has been cited in which such a security as was given in the present case has been sanctioned by the Court.

But, even if it could be shewn that an investment upon a security, which, speaking generally, was of the same nature as the present, could be made without the judicial factor incurring liability, it has to be considered whether the actual investment made in the bonds of this harbour trust can be justified. I agree with the learned judges in the Court below, who were unanimous on that point, in thinking that it cannot. The

(1) *Grainger's Curator*, 3 R. 479. (2) *Lloyd's Curator*, 5 R. 289.

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judicial factor in the present case obtained possession of the accounts for the one year preceding the time when he was considering this investment—the accounts for the year 1884—and those accounts shew a surplus of revenue over expenditure for that year of about 2000*l.*

Quite apart from the amount that it was known had been expended on additional works, I confess I cannot feel satisfied that it was a prudent thing to accept without further investigation the accounts for 1884 as establishing the propriety of this security. It seems to me that it would have been, to say the least, only prudent—and I think prudence was requisite—when the margin appeared to be so small and the liabilities, which were certainly maturing, to be so large—it would have been only prudent to look at the accounts of some of the previous years to see whether there was an expanding or a diminishing income. Now, if the accounts for several previous years had been examined, it would have been seen that the receipts of the harbour trustees had not been increasing receipts. In the year 1881 the harbour dues had amounted to 53,000*l.*, in 1882 to 52,000*l.*, in 1883 to 51,900*l.*, and in 1884 to 47,600*l.* There had been a continuously decreasing revenue from harbour dues, which of course was by far the principal revenue of the trust; the surpluses during those years had been 5000*l.*, 4200*l.*, 6300*l.*, and 2000*l.* in round figures. Now, it seems to me that a study of those figures would have suggested a doubt, even in view of the harbour undertaking as it then stood, whether the loan to the harbour trustees was a safe one—one which would not only secure the capital invested, but also the certain payment of the interest upon it.

But it was known, and it is frankly admitted to have been known, by the appellant at the time that a very large amount of money had been and was being expended on the creation of a new dock. There was, in point of fact, something like 600,000*l.* or 700,000*l.* raised for that purpose; and the interest upon this sum, which had been capitalised for the time, would amount, as soon as the dock was opened, to between 20,000*l.* and 30,000*l.* a year. Unless enough additional revenue was received to pay all the additional expenses which would neces-

sarily be incurred by the creation of a new dock, and to provide in addition to that a sum of at least 20,000*l.* or 30,000*l.*, there would not be enough to pay the interest upon the loans raised by the harbour trustees. Would that or would that not be the case? Well, this was a mere speculation; there was no test of experience which could possibly establish that it would. It depended upon a variety of circumstances—the extent to which this new dock might prove no more than sufficient for the increase of traffic which would come to it, the changes necessarily taking place in the amount of shipping that visited that particular port, and the competition between that port and neighbouring ports—on all these circumstances, which could in no way have been then brought to the test of experience, did it depend whether or not this harbour undertaking would be able to pay its way, to safeguard the capital entrusted to it, and to pay the interest upon it.

It seems to me that although that may have been an undertaking in which a person might well invest his own money if he had confidence in the future of the port, and might so have invested it without being chargeable with being a man indulging in rash or hazardous speculation, yet it is a totally different thing when he is dealing with the capital of a ward, the safety of the investments of the provision made for whom he is bound to guard with care and diligence.

I therefore entirely agree with the Court below in thinking that the investment cannot be justified.

I arrive at this conclusion, in a sense, with much regret. I have not the least doubt that the appellant acted with perfect honesty—that he thought it at the time an advantageous investment, and that he had no motive to serve except to invest for the benefit of his ward. It must always be a painful thing when under such circumstances it is necessary to make a judicial factor, whose remuneration in such a transaction as this is but small, responsible for a sum comparatively very large. On the other hand, where provision is left for a child by a parent, and the care of the sum thus left is entrusted to a judicial factor, it is very important that the ward, who is entirely in the hands of that factor as regards the safety of the

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investment, should not be allowed to be deprived of the provision made for her by want of the requisite judgment and prudence on the part of the judicial factor.

I move your Lordships that the interlocutor appealed from be affirmed.

I would only add this: Mr. Haldane took exception to the omission from the interlocutor of the words "in the circumstances of the case," which had appeared in the interlocutor as I understand as originally settled by the Lord Ordinary. To my mind the reinsertion of those words would not make any difference, inasmuch as every decision is really a decision on what is the law and what is the result in the circumstances of the case. Therefore I do not think there would be any advantage in restoring the words as suggested by the learned counsel.

LORD WATSON. I agree with the opinion that has just been delivered by my noble and learned friend.

I am quite satisfied that in this case the factor loco tutoris, the appellant, acted in perfect good faith; but I do not think that circumstance is sufficient in law to afford a justification of the security upon which he has invested the funds of his ward.

I do not think that under the Pupils Protection Act, or under any statutory warrant or at common law, the accountant of the Court has power to approve of improper investments. I think that is a point upon which the Court must be the sole judges. I do not find any indication of such a power in the Acts under which the accountant of court's office was constituted and now exists.

In the second place, it is in vain to say that the security taken by the factor was in any sense a security over "land or real or heritable estate." It was a personal charge upon the revenues of the Board of Administrators who managed the harbour and docks of Greenock. No doubt the Acts under which they administer contain a provision to the effect that if there is a shortcoming of funds the creditors who have lent their money may obtain the appointment of a judicial factor—

but a judicial factor for what purpose? To receive the rents and revenues—nothing more.

The next, and probably the most important point to be considered in this case, is this: In what sense was this a justifiable loan? I am not going to follow my noble and learned friend through the various classes of investment which he has noticed —those classes of investment which have been sanctioned by the Court and those which have not. I will only say that I think in the present case the security clearly falls within the latter class. In the first place, without going into the figures in detail, it is perfectly clear on the face of the record, and it becomes still more clear when the evidence is looked at, that this security was one which wholly depended for its worth upon the success or failure of what was no doubt a legitimate commercial adventure. The adventure might succeed—there were great expectations that it would succeed; but expectations of that kind with respect to possible commercial prosperity are a very unsafe subject upon which to lend money. In many cases the loan may be perfectly safe; in others, when a casualty comes, I think we should be infringing a—I was about to say very well known, but I am sorry to see it is not so—rule of the law of Scotland, if we were to sanction such an investment as this, as a proper one for either a tutor or factor loco tutoris dealing with the property of his pupil or ward. I therefore concur in the judgment that has been moved, and I have only to remark that the Order of the House must be so framed as to exclude the three interlocutors pronounced by the Lord Ordinary which have been, by mistake or otherwise, included in the petition of appeal. They have not been reviewed by the Inner House, and are not appealable under the provisions of the Act of 48 Geo. 3.

LORD SHAND. It is clear that the defender in this case acted in bonâ fide, and gave his evidence with very great candour when he was under examination before the Lord Ordinary. That being so, I need not say that I concur with what has fallen from your Lordships in the expression of regret that nevertheless responsibility should rest upon him for this

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investment. Loss has been sustained; it must either fall upon the judicial factor who made the investment or upon the minor pupil; and, as it appears to me, concurring as I do with all of the judges in the Court below, that there was a want of that caution and care that should be exercised by a judicial factor in such circumstances, I think it must follow that the loss should fall upon him rather than upon the pupil, who had no protection except that care and caution which the factor alone could exercise.

With reference to the investment itself, it has no doubt been shewn, and I am very far from leaving such a consideration out of view in this class of cases, that investments in Greenock Harbour securities were very popular in the town itself and in that district and, perhaps, throughout Scotland to some extent. That is a circumstance which should not, I think, be thrown out of view; but, upon the other hand, it will not in any way relieve the judicial factor from the duty of exercising care and prudence, and examining the particular investment for himself when he has his ward's money to invest.

It has been said that this is of a class of security which has been sanctioned by the Court in other cases. In that I do not agree. It is quite true that investment in railway debentures has been sanctioned, and, indeed, these are now made lawful investments under Act of Parliament; but there is the broad distinction which has been pointed out by your Lordships, that in that class of cases there is a power of entering into possession—the security-holder can get into possession—of the property from which the income was derived, while in this particular case there is no such power. There is a power merely to receive such revenues as the administrators of the trust may get into their hands under their administration—an administration which in its detail was subject to their discretion. I entirely agree in the view expressed by the First Division of the Court in the last of the cases which was cited—*Cowan's Trustees* v. *Ferrie's Curator* (1)—that the two classes of securities are quite distinguishable.

My Lords, in regard to the prudence of the investment itself,

(1) 24 R. 590.

I see that the learned judges in the First Division contented themselves with simply referring to what had been said by the Lord Ordinary and expressing their concurrence. I do not think I can do more. Lord Kyllachy has very clearly stated the grounds which make this investment open to objection. It appears to me it is not enough, particularly in dealing with what after all is to some extent a mercantile speculation, that a judicial factor should look only at the last balance-sheet which had been issued before he made the investment. That ought to be considered and compared, as it appears to me, by a man of business making an investment for his ward, or for the estate he administers with the balance-sheet and reports of previous years. If that had been done, I think, whatever may have been the public opinion of investments of this class, the judicial factor himself would have come to the conclusion that there was a gradually deteriorating income, and that it was not safe to put his ward's money in an investment of that class, particularly as the trustees in the administration of the harbour were about to borrow an extremely large sum of money for a new enterprise, imposing therefore upon their undertaking a large amount of additional interest to be met, which required a corresponding amount of income, and which involved considerations of a speculative kind.

Upon these grounds, and expressing regret that we must decide the case so, for the reasons I have stated, I concur in thinking that the appeal must be refused.

In regard to the position of the Accountant of Court, the duties which he has to discharge are undoubtedly a useful and valuable check on the actings of judicial factors and, it may be in many cases, specially on their actings with reference to the securities in which the funds of the estate may be invested. But I am not prepared to say that this check will in any way or to any extent relieve the factor from responsibility for his acts. In the present case the accountant might well have thought that the security was similar to the debentures of a railway company in which there was a power to have a factor appointed to enter on possession of the undertaking. In order to ascertain whether this was so, he would require to have had

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the details of the constitution of the company before him. It would scarcely be possible for him, in the discharge of his duties, to examine securities in such detail as to enable him in many cases to say that the investment was an improper one, whether regard is to be had to either the class of the security or the propriety of the investment, looking to the position and history of the particular undertaking. It appears to me that the responsibility for the class and nature of the investment must rest with the judicial factor, although it is a benefit alike to him and to the estate that the Accountant of Court shall to some extent in the execution of his duties form a valuable check.

LORD JAMES of HEREFORD. With the statement of facts and the observations upon those facts made by my noble and learned friend now on the Woolsack (Lord Herschell) I entirely agree. Therefore, I concur in the conclusion that this appeal must be dismissed.

The Interlocutor of the First Division of the Court of Session dated May 14, 1897, *affirmed and the appeal dismissed with costs.*

Lords' Journals, February 28, 1898.

Agents for appellant: *Grahames, Currey & Spens, for Menzies, Black & Menzies, W.S., Edinburgh.*

Agents for respondents: *William Robertson & Co., for W. & J. Burness, W.S., Edinburgh.*

[HOUSE OF LORDS.]

HART'S DIVORCE BILL.

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March 14.

Divorce—Irish Divorce Bill—Infant—Custody—Practice.

In an Irish divorce bill, although no separate action has been instituted in Ireland to obtain the custody of infant children after a decree for separation a mensâ et thoro has been pronounced, the House of Lords will sanction a clause giving the custody of the children to the innocent party.

Mrs. Addison's Case, (1801) Macq. Prac. H. L. p. 598, followed.

Bill to dissolve the marriage of the petitioner Edith Susan Anna Vernon Hart with Henry Chichester Hart, on the ground of his cruelty and adultery committed in Ireland and England.

The parties were married in Ireland, where both were domiciled, on June 15, 1887; and they lived together until March 16, 1896, when the petitioner found it necessary, owing to the injury to her health caused by the continued drunkenness, and on two occasions the violence of her husband, to finally leave him. It was then discovered that he had been guilty of adultery with at least one woman. He had also been guilty of adultery some time before the separation, but that injury had been condoned.

There was issue of the marriage two children, now aged ten and four respectively.

On June 18, 1897, the Probate and Matrimonial Division, Ireland, pronounced a decree of divorce a mensâ et thoro, but there was no second action in the Irish Chancery Court asking for the custody of the infant children; and in these circumstances the following clause was added to the petitioner's bill for divorce. Clause 6: "In order to secure as far as circumstances will admit the virtuous education of the said Louisa Frances Hart and Edith Rosamond Hart, the children of the said Henry Chichester Hart and Edith Susan Anna Vernon Hart, be it enacted that it shall not be lawful for the said

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Henry Chichester Hart to remove his said daughters or either of them from the care and custody of their mother during their respective minorities."

SECOND READING.

1898. March 14. *James William Greig*, for the petitioner, opened the case; adduced evidence which clearly proved the allegations in the bill; and as to the clause giving the petitioner custody of the children, cited *Mrs. Addison's Case* (1), where a somewhat similar clause was sanctioned.

[EARL OF HALSBURY L.C. There is no doubt that this House has sanctioned a similar clause to this.]

THE HOUSE (Earl of Halsbury L.C. and Lords Herschell, Macnaghten, and Shand) read the bill a second time.

Solicitors for petitioner: *Lewis & Lewis, for Mooney & Son, Dublin.*

(1) Macq. Prac. H. L. 508, 594 and 598.

[HOUSE OF LORDS.]

[APPEAL COMMITTEE.]

EARL RUSSELL . . . . . PETITIONER; H. L. (D.)

AND 1898

COUNTESS RUSSELL . . . . . RESPONDENT. *March* 29.

Practice—House of Lords—Divorce—Set off of Costs—Supreme Court Rules, Order LXV., *r.* 14.

The Appeal Committee after final judgment has been given in the appeal will not set off costs due by an appellant in the House of Lords against balance costs due to the appellant as the result of a decision in the Court of Appeal. If there is a probability of any question of costs or any other matter arising after and as incident to the appeal, the matter ought to be mentioned at the hearing.

COUNTESS RUSSELL brought an action in the Divorce Court for restitution of conjugal rights. That was met by Earl Russell's counter-demand for judicial separation on the ground of cruelty. (1) The Court of Appeal refused both applications, with costs. The parties both lodged appeals to the House of Lords. The Countess having abandoned her appeal, she was refused leave to restore it. The Earl's appeal continued. Judgment was reserved for consideration on July 14, 1896, and eventually the Earl's appeal was dismissed with costs on July 16, 1897. (2)

On January 19, 1898, in the matter of taxing the costs of both sides up to the decision in the Court of Appeal, there was an order of the Court of Appeal made, and as the result of that order Countess Russell got certain costs, and Earl Russell obtained certain costs, the final balance being that Earl Russell was granted an order for payment of 600*l.* costs from the Countess. Thereupon the Earl petitioned the House of Lords to set off the costs he was entitled to in the Court of Appeal against the costs, amounting to about 400*l.*, which the Earl would, on completion of taxation in the House of Lords, be liable to pay to the Countess.

(1) [1895] P. 335. (2) [1897] A. C. 395.

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Mr. *Doulton*, solicitor for the petitioner, cited *Robarts* v. *Buèe* (1), *In re Crawshay*, *Dennis* v. *Crawshay* (2), and Supreme Court Rules, Order LXV., r. 14, and contended that the proceedings in the Court of Appeal and those in this House were the same proceedings, and that there was a discretion in the Appeal Committee to order a balance to be struck in the Earl's favour, which balance he would never bring execution for: That Earl Russell might have taxed his costs two years ago in the Court of Appeal and got them, but was under the belief that if the House made a different order he would have a right to set-off.

March 29. THE APPEAL COMMITTEE (Earl of Halsbury L.C. and Lords Watson, Macnaghten, Morris and Davey) refused the petition with costs, intimating that Order LXV., r. 14, did not apply to the House of Lords, and that it was not now competent after final judgment had been given, and the common law right of solicitor's lien had possibly arisen, to attach any condition to the costs given in the House; although, if the matter had been mentioned at the hearing of the appeal, the House might have, in the exercise of its undoubted discretion, insisted that the Countess should agree to these costs being set off, or otherwise, the House might have excused Earl Russell from paying costs. But that was an entirely different power from the present application, which was truly an application to alter fixed rights.

Lords' Journals, March 31, 1898.

Solicitors for petitioner: *Vandercom, Hardy, Oatway & Doulton.*

Solicitors for respondent: *Valpy, Chaplin & Peckham.*

(1) (1878) 8 Ch. D. 198. (2) (1890) 45 Ch. D. 318.

[HOUSE OF LORDS.]

THE SOUTH AFRICAN TERRITORIES, LIMITED . . . . . } APPELLANTS ; H. L. (E.) 1898 March 18.

AND

WALLINGTON . . . . . RESPONDENT.

Company—Debentures—Specific Performance—Agreement to lend Money—Action for Breach of Contract to pay Instalments of Loan—Damages, Measure of.

The rule that specific performance cannot be granted in respect of a contract to lend money applies to a contract to lend to a company money, payable by instalments, upon the security of debentures to be issued by the company.

Where the lender makes default in payment, the moneys due for unpaid instalments do not constitute a debt to the company, and the company are only entitled to damages for the actual loss caused by the breach of contract.

The decision of the Court of Appeal, [1897] 1 Q. B. 692, affirmed.

THE following statement of facts is taken from the judgment of Lord Herschell :—

In September, 1895, the appellant company issued a prospectus offering to the public an issue of 75,000*l.* in 1500 first mortgage debentures of 50*l.* each, bearing interest at 6 per cent. and being repayable with a bonus of 7*l.* 10*s.* each on December 31, 1900. The debentures were to form a floating charge on the whole of the properties and assets of the company. The prospectus stated that the allottees of this issue would have the right to exchange them at par for an equal amount of shares at any time within two years after December 31, 1896, that the debentures were to be payable 10 per cent. on application, 15 per cent. on allotment, 25 per cent. two months after allotment, 25 per cent. four months after allotment, and 25 per cent. six months after allotment, and that failure to pay any instalment when due would render previous payments liable to forfeiture.

In the same month, the respondent having deposited with

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the appellants' bankers 80*l.*, being the 10 per cent. required by the prospectus, signed a form of application for the allotment to him of sixteen of the debentures, and thereby agreed to take such debentures, or any less number that might be allotted to him, on the terms of the prospectus, and to pay the further instalments due thereon in accordance with the terms of the prospectus. The appellant company accordingly, a few days later, allotted to the respondent sixteen debentures in the company, and gave him notice thereof.

The respondent having refused to make any further payments the present action was brought against him by the appellants on March 6, 1896, when all the instalments except the last had become due. The appellants claimed: 1. specific performance of the contract; 2. payment of the balance of the price of the debentures; 3. damages.

The action came on for trial before Wright J., and was determined by the learned judge in the course of a discussion with the learned counsel who appeared for the respective parties, initiated by the learned judge during the course of the opening address of the learned counsel for the plaintiffs. The learned judge held that the claim for specific performance could not be sustained, but gave judgment for the plaintiffs on the ground that a debt had been created by the defendant's promise to pay contained in his letter of application. Judgment was accordingly entered for the plaintiffs for 520*l.*, the amount of the instalments due and unpaid at the date of the writ, and costs. From this judgment the defendant appealed, giving notice that he should move that the judgment be reversed, and that in lieu thereof judgment should be entered for the defendant, or a new trial had. The Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.) reversed the judgment of the Court below, and ordered that judgment should be entered for the defendant with the costs of the appeal and the costs of the action incurred subsequent to the date of the payment into court by the defendant of the sum of 5*s.*, the plaintiffs to have the costs of the action up to the date of that payment. (1)

(1) [1897] 1 Q. B. 692.

Against this decision the present appeal was brought.

1897. Nov. 29, 30. *Sir R. T. Reid Q.C.* and *C. Herbert-Smith* (*H. D. Woodcock* with them), for the appellants. This is not a case of a breach of contract merely to lend money. It was a contract to take debentures on certain terms, in fact to buy them at a price payable by instalments. After allotting the debentures the appellants materially altered their position, and executed a trust deed whereby they parted with the property to trustees for the debenture-holders, and paid for the property in reliance upon the promises to pay the instalments. They also retained ordinary shares to be exchanged for the debentures in the event of the respondent's exercising his option to require the exchange within the prescribed period. Moreover the appellants performed their part of the contract, allotting and setting apart the debentures contracted for, and nothing but the respondent's default prevented the appellants' contract being entirely performed by a delivery of the debentures. Such a contract is a proper subject for specific performance. Wherever the remedy at law is inadequate, equity may grant specific performance: *Doloret* v. *Rothschild* (1); *Adderley* v. *Dixon*. (2)

[LORD HALSBURY L.C. Sir Edward Fry comments on those decisions in Fry on Specific Performance, § 60–66, 3rd ed. pp. 26–30. His Lordship also referred to *Johnson* v. *Bland* (3), per Lord Mansfield.]

Here the remedy at law is manifestly inadequate unless the decision of Wright J. is sound, that the contract to pay the instalments constituted a debt for which the appellants were entitled to judgment. This is not, like *Sichel* v. *Mosenthal* (4), a mere contract to lend money. In *Ashton* v. *Corrigan* (5) and *Hermann* v. *Hodges* (6) specific performance was decreed of agreements to execute mortgages, and the remedy if appropriate to one side of the contract must be so to the other. And see *Bass* v. *Clivley*. (7) If the respondent had paid all

(1) (1824) 1 Sim. & St. 590.
(2) (1824) 1 Sim. & St. 607.
(3) (1760) 2 Burr. at p. 1086.
(4) (1862) 30 Beav. 371.
(5) (1871) L. R. 13 Eq. 76.
(6) (1873) L. R. 16 Eq. 18.
(7) (1829) Tamlyn, 80.

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the instalments and the debentures had been withheld, the respondent would have been entitled to specific performance, and the remedy must be mutual. The judgment of Wright J. may also be supported either on the ground that the contract was a contract of sale or on the ground that the contract itself fixes the amount of damages, which are thus liquidated and ascertained. If however the judgment of Wright J. is not to be restored there ought to be a new trial that the appellants may have the opportunity of proving damages. The learned judge having given the full amount the appellants were relieved from offering evidence of damage.

Bray Q.C. and *Gore-Browne*, for the respondent, were directed to confine their arguments to the last point. The appellants gave no evidence of damage at the trial: it is difficult to see how there could be any, having regard to the interest payable and the right of forfeiture; at all events they did not suggest at the trial that there was any actual damage. Under the circumstances a new trial would be an injustice to the respondent except on the terms of the appellants paying the costs.

The House took time for consideration.

1898. March 18. EARL OF HALSBURY L.C. My Lords, the forms which have been contrived for the business of joint stock companies and which, when applied to their proper purposes, are convenient, are nevertheless somewhat calculated to mislead when their mere language is regarded. The applicant for debentures on the face of the instrument contracts to pay something, but the real nature of the whole transaction is an agreement by the applicant to lend money at certain interest, and the action in this case was in truth mainly, if not altogether, directed to compel the intending lender to perform his contract to lend, which undoubtedly he had refused and neglected to do.

With respect to the claim for specific performance, a long and uniform course of decision has prevented the application of any such remedy, and I do not understand that any Court or

any member of any Court has entertained a doubt but that the refusal of the learned judge below to grant a decree for specific performance was perfectly right. But, of course, in this, like any other contract, one party to the contract has a right to complain that the other party has broken it, and if he establishes that proposition he is entitled to such damages as are appropriate to the nature of the contract.

In this case, as I have said, the contract was to lend money. Referring to the question of damages, the amount of interest to be paid for the loan, and the fact that 80*l.* was under the contract itself forfeited to the company for the non-performance of the contract in its entirety, render it difficult to see what substantial damages could have been recovered, and I regret that under the circumstances it should have been thought advisable to appeal to your Lordships in a case which, upon a review of the facts, does not appear in any view of it to have been worth the expense necessarily involved in such an appeal. Your Lordships were informed that the action took seven minutes to try, with the result that it has now been to two Courts of Appeal, and, but for what I am about to say, might have resulted in a new trial.

Upon a careful review, however, of the facts, I have come to the conclusion that it would be impossible to suggest any serious damages in this case, and the tacit admission of the parties, by their declining to consider the question of a new trial upon payment of costs, renders it unnecessary for me to do more than to say that in this case justice has been done by the Court of Appeal reversing the decision of the learned judge below. I think it right, however, to add that if any serious right were involved, or if it was reasonably possible that injustice had been done, I should have felt myself at liberty to give my opinion in favour of a new trial.

I agree that in this case the parties had in a great measure themselves to blame, but I think the blame was not entirely theirs, and where a miscarriage has taken place by errors in procedure, I think the proper remedy is to make the party in default pay for his error in the shape of costs, and not to deprive him of important rights, if any such exist. Of course, where

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error in procedure leads to altering the position of the other litigant party, it may well be that mere payment of costs will not do justice, and in such cases the party in default must suffer. But, speaking generally, a blunder in procedure, if it can be set right, and if important rights are involved, receives its most appropriate penalty on being made the subject of an order for costs.

I think, therefore, in this case that the appeal ought to be dismissed, and dismissed with costs, and I move your Lordships accordingly.

LORD WATSON (after stating the facts set out above). My Lords, the only engagement made by the respondent with the company consisted in a promise to advance money to them in loan; and it is settled in the law of England that such a promise cannot sustain a suit for specific performance. It is equally clear, in my opinion, that the obligation of the company to issue mortgage bonds against the loan did not in any way alter or affect the character of the transaction, or give the company any right to sue as for the price of an article sold by them which they were ready to deliver. The only remedy open to the company was by action against the respondent for any loss or damage which they might sustain through his breach of promise.

The case was tried before Wright J., who gave the company decree as for the price of the debentures which the respondent had agreed to take up. I cannot say the trial was satisfactory. The proceedings were chiefly occupied by a discussion between the learned judge and the respondent's counsel, in the course of which the former indicated the terms of the order which he meant to pronounce. No evidence of damage was tendered by the appellant company.

An appeal was taken by the respondent upon a notice of motion that the decree of Wright J. should be reversed or varied, and that judgment should be entered for him or a new trial allowed. At the hearing of the appeal counsel for the company urged the first and second of the claims made by them and did not refer to their claim of damages. After the judgment of the

Appeal Court was delivered, reversing the order appealed from and entering judgment for the respondent, counsel, in the absence of the head of the Court, moved two Lords Justices to remit the case for trial of the question of damages. Their Lordships declined to entertain the application.

On the hearing of this appeal, counsel for the company again pressed upon your Lordships the desperate arguments which they had addressed to the Court of Appeal, and moved your Lordships to send back the case, in order that the company might have an opportunity of proving damage. I do not doubt that it is within the discretion of the House to grant or refuse that motion; but I am very clearly of opinion that, in the circumstances of this case, your Lordships' discretion ought not to be exercised in favour of the appellants, and that the order appealed from ought to be affirmed with costs.

LORD HERSCHELL (after stating the facts above set out). My Lords, I do not think it is open to any doubt that a person with whom a contract to lend money has been entered into cannot obtain specific performance of that contract. All the learned judges who have considered this case have been of that opinion, and none of the authorities cited afford any real support to the contrary view.

But for the fact that Wright J. arrived at another conclusion, I should have thought it equally clear that the sums of money constituting the instalments which the defendant agreed to pay did not constitute a debt. It was argued that the defendant had agreed to purchase certain debentures of the company, and that the moneys sought to be recovered were the price of the debentures so agreed to be purchased. I think this is a fallacy. The transaction was not in its nature a contract of purchase: it was an agreement on the one side to lend money for a term of years, and on the other side to give the lender the specified security for his loan. I am at a loss to see how an agreement of this description can create a debt from the lender to the borrower.

So far the case is free from any difficulty, but the alternative claim of damages for breach of the contract remains to be

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considered. At the trial no evidence was given to shew that the plaintiffs had, in fact, sustained any damage by the breach of contract, and that the 5*s.* paid into court over and above the 80*l.* paid on application was not sufficient to compensate the plaintiffs for any damage they had sustained. By the terms of the prospectus the failure to pay the subsequent instalments rendered the 80*l.* payable on application liable to forfeiture. Wright J., in the course of the discussion to which I have referred, said: "In order that an end may be made of the matter, if I am wrong on one point and right on the other, can you suggest that the damages, if it is damages, should be less than the amount which he agreed to pay?" In answer to this the learned counsel for the defendant pointed out that though the plaintiffs were deprived of the use of the money for four years, they would have had, according to the prospectus, to pay about 8 per cent. for its use, and that they had got the 80*l.* deposit. The learned counsel for the plaintiffs made no observation upon this, and the learned judge then gave judgment.

I think that in strictness the counsel for the plaintiffs should have called attention to the fact that he was prepared to tender evidence in proof of actual damage sustained by the plaintiffs, if he wished to reserve the benefit of it supposing the learned judge were wrong in his view as to the measure of damages. I can quite understand that he was embarrassed by the course taken by the learned judge in bringing the trial at so early a stage to a summary conclusion. I think it is to be regretted that, no doubt with a view to save the public time, the learned judge interposed at so early a period, and did not let the trial take its natural course. At the same time, where a learned judge has intimated, as Wright J. did, a desire that an end might be made of the matter, in case he should be wrong, I think the proper course is, if counsel has any evidence which in that view might be material, to mention the matter to the judge. Nevertheless, if the learned counsel for the plaintiffs had in the Court of Appeal called the attention of that Court to the fact that, supposing the learned judge in the Court below to be wrong, the amount of damages to which they were entitled had been left

undetermined, I think, considering the course which the case took at the trial, the Court of Appeal might quite properly have granted a new trial if they thought a substantial point had been left untried. Their attention however, it is admitted, was never called to the fact that the plaintiffs were prepared to offer evidence as to the amount of damage sustained, and it was not urged on their behalf that, if the judgment in their favour was not allowed to stand, judgment should not be entered for the defendant, but only a new trial be ordered. It was indeed stated at the bar that the learned counsel for the plaintiffs had expressly abandoned any such point, but I do not insist on this. On the materials before them, I do not see how the Court of Appeal could have given any other judgment than the one they gave. How could they order a new trial when it was not brought to their notice that there was anything to try, or that there was any further evidence forthcoming?

After judgment had been delivered, the learned counsel for the plaintiffs for the first time asked that the order should be for a new trial, and stated that they wished to give evidence as to damages. I do not doubt that the Court might, even then, on such terms, if any, as they thought fit, have made an order for a new trial, instead of entering judgment for the defendant. But in my opinion a party is not entitled to wait until judgment has been delivered against him, and then for the first time raise such a point.

If he has obtained judgment in the Court below, and the opposite party moves to substitute a judgment in his favour, the respondent, if he intends to maintain that even though he cannot maintain his judgment the other party is at most entitled to something less than a judgment in his favour, ought, I think, to make the point in the course of his argument. I cannot see that his contention that the Court below rightly decided would be in the slightest degree weakened by his contending, as an alternative, that the appellant was entitled at the most to something less than the full relief he claimed.

My Lords, I have thought it right to say so much because I am unwilling to afford any countenance to the view that a party is entitled to wait until judgment has been delivered

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before presenting such a contention. It would tend to lax procedure, and frequently to great inconvenience.

For the reasons I have expressed, I do not think the plaintiffs are entitled, as of right, to demand that your Lordships should vary the order of the Court below and grant a new trial. At the same time, I do not doubt the power of this House to make such an order on suitable terms where, in its opinion, the ends of justice so require. The learned counsel who appeared for the plaintiffs at the bar, stated, in answer to a question put to them, that they did not desire a new trial if it were to be granted only on payment of costs. I do not feel it necessary, therefore, to inquire whether the course which the case took at the trial would have rendered this a proper order in the present case.

It may be well that I should add that I do not believe the plaintiffs suffer any prejudice by not obtaining a new trial. In view of the nature of the contract broken, and the measure of damages applicable to it, I am satisfied that they could not have established a right to anything beyond what they have already received.

LORD MACNAGHTEN. My Lords, the appellants claimed by their writ (1.) specific performance, (2.) payment of the remaining instalments, described in the writ as "the price of the debentures," or (3.) damages. The first two claims have been rejected by the Court of Appeal. The third has not been considered as yet.

It is quite plain that the contract made by the offer of these debentures and the acceptance of that offer is nothing more or less than a contract to borrow and a contract to lend so much money payable by instalments. The essential character of the transaction is not altered either by the circumstance that the creditor in a certain event is to have the option of exchanging his position for that of a shareholder, or by the complicated nature of the arrangements made for the lender's security.

That specific performance of a contract to lend money cannot be enforced is so well established, and obviously so wholesome a rule, that it would be idle to say a word about it.

As regards the second head of claim, it is enough to observe that there is no contract to pay except as incidental to the contract of loan. There is no contract of sale at all. The term "price" applied to such a transaction as this is quite out of place. To order payment, as was done in this case, of an amount equal to the sum of the remaining instalments, would be to enforce the agreement against one of the parties to the contract and to set the other free—free from any obligation to pay interest, and free, too, from any obligation to repay the principal. That would be a very one-sided sort of specific performance, contrary to all precedent, and in the result plainly unfair.

So far there is no difficulty, and there can be no room for doubt. But the learned counsel for the appellants raised a point in connection with the third head of claim which requires rather more consideration. That claim, as they said, and said truly, had not been dealt with at all. It was not disputed that the contract had been broken. There was, therefore, primâ facie a case for damages. That there were no materials before the Court for assessing the amount of compensation was not, they said, wholly their fault; and so they asked this House, under the circumstances, to allow a new trial on that one point.

My Lords, if I thought there had been any miscarriage of justice—if I thought that, owing to some accident, or to anything but the neglect or perhaps the prudence of the appellants themselves, they had been shut out from the trial of a question which they seriously desired to try, I should for my part have thought that the indulgence ought to be granted, assuming that it could be granted on terms not unfair to the other side. But I think there is no substance in this claim; and I much doubt whether the appellants ever really meant to put it forward, except as a sort of cover in case of disaster, or as a justification or excuse for embarking on litigation of an exceptionally experimental character.

Thinking, as I do, that there is nothing substantial in the claim for damages, and that the appellants, if they keep the deposit, will be more than compensated for any loss which they

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could possibly prove, and thinking, too, that this claim for damages may have been advisedly not pressed before the Court of Appeal, and seeing that it was not put forward until after judgment was given, I am of opinion that the application for a new trial ought to be rejected. To admit such a claim would, I think, be a very dangerous precedent.

I think the appeal should be dismissed altogether, and with costs.

LORD MORRIS (after stating the facts). My Lords, I cannot add anything to the reasons given in the judgments in the Appeal Court and by your Lordships as to why the company cannot recover either by way of specific performance or by the payment of the balance of the price of the debentures. I am equally clear that the company was entitled to recover on the third head of claim for damages to such amount as they gave evidence in support of. The defendant had clearly broken his contract contained in his letter of application, and necessarily was bound to indemnify the company in respect of such damage. The real question between the parties was never tried, because the learned judge at the trial summarily ruled that the company was entitled to recover 520*l.*, the balance of the price of the debentures, and gave judgment accordingly. What damage, if any, the company really sustained has never been investigated.

The respondent by his notice of appeal sought either that judgment should be entered for him or for a new trial. In the judgments of the Lords Justices in the Court of Appeal there is no trace of any argument having been urged as to a right to recover some damages; but after judgment had been pronounced counsel for the company applied to the Court of Appeal that the order should be for a new trial, as the plaintiffs had witnesses at the trial to prove damages. In my opinion, that should have been the order made, but on the terms of the plaintiffs paying the costs of the first trial, as the plaintiffs had accepted the ruling of the learned judge on the second ground of action for the price of the debentures, leaving the third claim for damages untried; and, in my opinion, that is the order your Lordships should now make, but that the plaintiffs

counsel stated they could not take an order for a new trial on the terms of paying such costs.

I therefore concur in the judgment that the appeal should be dismissed with costs.

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Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 18, 1898.

Solicitors for appellants: *Francis Voules & Co.*
Solicitors for respondent: *Ranger, Burton & Frost.*

[HOUSE OF LORDS.]

THE LIQUIDATION ESTATES PURCHASE COMPANY, LIMITED . . . } APPELLANTS;

AND

SIR JOHN CHRISTOPHER WILLOUGHBY AND OTHERS . . . . . } RESPONDENTS.

H. L. (E.) 1898 *March* 18.

Mortgage—Purchase of Equity of Redemption—Payment of Mortgage Debt by Purchaser—Presumption of Intention to keep alive Security.

The purchaser of an equity of redemption took an assignment of a charge upon the property and paid off the incumbrancer. There being no evidence in the deed or the circumstances of any ntention to extinguish the charge and it being for the purchaser's benefit to keep it alive:—

Held, reversing the decision of the Court of Appeal, [1896] 1 Ch. 726, that the charge was not extinguished.

THE following statement of facts is taken from the judgment of Lord Herschell:—

In 1888 E. J. Walker had contracted to purchase the business and assets of the firm of Walkers, Parker & Co. for the sum of 502,000*l.*, and was required to pay into court a deposit of 25,000*l.* on account of the purchase. By an agreement made June 20, 1888, between E. J. Walker of the one part, and Lord Henry Paulet, Sir John Willoughby, and Kennedy of the other part, E. J. Walker charged all his present and future interest

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in his purchase contract with the payment of the moneys subscribed by the persons above named, and the bonuses thereon, each subscriber being entitled to receive a bonus equal to the amount of his subscription; and it was further provided that the subscribers should, as between themselves, rank rateably and pari passu as against the property thereby charged for the sum subscribed by them respectively and the bonuses thereon.

The agreement also provided that nothing therein contained should render E. J. Walker personally liable to repay to the subscribers the sum of 25,000*l.* or the bonus thereon, and, further, that it should not be in his power to resell the business and property referred to in the agreement otherwise than with the consent of the subscribers, provided that such consent should not be withheld if E. J. Walker could obtain the sum of 800,000*l.*, nor should it be competent for the subscribers to compel him to sell the business and property for a less sum than 650,000*l.*

The 25,000*l.* required for the deposit was paid by the subscribers upon the terms of the agreement, and was applied in payment of the deposit. The amount subscribed by Kennedy was 6000*l.*, in respect of which he became entitled to the benefit of the agreement of June 20 as a security, for the repayment of that sum with a bonus of equal amount, making together 12,000*l.* The amount subscribed by Sir John Willoughby was 10,000*l.*, and by Lord Henry Paulet 9,000*l.*

On September 21, 1888, by an agreement of that date, Kennedy charged all his interest under the agreement referred to, and the moneys and bonuses thereby secured, with the payment to Norton of sums amounting altogether to 6200*l.*, and the agreement recited that in respect of a portion of that sum Norton had other securities. The agreement did not give Norton a power of sale. Notice in writing of this charge was, on October 24, 1888, duly given by Norton's solicitors to E. J. Walker, and acknowledged by him.

In January, 1889, E. J. Walker sold the greater part of the property which he had contracted to purchase from the firm of Walkers, Parker & Co. to a company called Walkers, Parker & Co., Limited, for the sum of 850,000*l.*, payable as to 550,000*l.*

in cash and as to 300,000*l.* in shares of the Walker Company of 10*l.* each fully paid up.

In April, 1889, 5122*l.* was paid to Kennedy by Walkers, Parker & Co., Limited, by the direction of E. J. Walker, and in June 1890, certain property in Wales of the value of 5000*l.*, included in the original purchase, was conveyed to Kennedy. This payment and conveyance must be taken, as both Courts below held, to have been made and executed without the knowledge and concurrence of Norton.

By a deed dated August 7, 1890, Kennedy assigned all moneys receivable or recoverable by him under the agreement of June 20, 1888, to Lord Windsor, upon certain trusts therein declared for securing the payment of all moneys then owing to him by Kennedy. (1)

By two other deeds dated December 20, 1890, and June 18, 1891, all the interest of Kennedy under the agreement of June, 1888, and the benefit of the deed of August 7, 1890, became vested in Forrest, upon trust to apply all moneys received or realized from the property comprised in the agreement in payment of all moneys then owing by Kennedy to Lord Windsor, and to pay any surplus to Kennedy.

On March 17, 1893, a deed was executed as to the effect of which the controversy between the parties arose. It was made between Forrest of the first part, Norton of the second part, Lord Windsor of the third part, the Capital Finance Company of the fourth part, and the appellant company of the fifth part. It recited (inter alia) the above transactions, also a contract by Lord Windsor for sale to the Capital Finance Company, at the price of 6000*l.*, of certain property including all the interest of Lord Windsor or of Norton in the premises comprised in and charged by the agreement of June 20, 1888, and that this contract, so far as regarded Norton's rights and interests, was entered into by Lord Windsor with his privity and approbation and upon the terms that Norton should receive 1000*l.*, part of the purchase-money of 6000*l.*, as the consideration for the assignment of his rights and interests, and that the Capital

(1) The terms of the trusts are discussed in the judgment of Lord Macnaghten.

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Finance Company had paid Lord Windsor 4000*l.*, part of the 6000*l.* It further recited a contract of sub-purchase by the appellant company from the Capital Finance Company, and that the appellant company had agreed to pay 2000*l.*, the balance of the 6000*l.* The deed witnessed that Norton "at the request of Lord Windsor, and in respect of his rights, powers, benefits, and interests under the said agreement of September 21, 1888, and as mortgagee," thereby assigned, and Lord Windsor and Forrest also assigned, and the Capital Finance Company released and confirmed, unto the appellant company, "all the estate and interest of the said Lord Windsor, John Norton, or Robert Forrest of and in the interest formerly of the said Arthur John Clarke Kennedy in or under the said agreement of June 20, 1888, and the moneys and bonuses thereby secured, to hold the same unto the said Liquidation Estates Purchase Company, Limited, absolutely." It was declared by the deed that if Norton and Lord Windsor, or either of them, had a power of sale over the premises, the deed should operate as a conveyance upon a sale in exercise of such power.

The respondent, Sir John Willoughby, in June, 1889, instituted an action against Lord Henry Paulet, Kennedy and others, to realize his security under the agreement of June 20, 1888. Norton was not a party to that action. Certain funds having been brought into court representing the proceeds of the property charged by the agreement, a distribution of such funds was ordered, upon the footing of Kennedy having already received the sum of 10,122*l.* on account of his share. Further sums were subsequently brought into court, and the appellants, who until that time had had no notice of the action, obtained leave to attend the proceedings. The respondent, Sir John Willoughby, and the persons claiming under Lord Henry Paulet, contended that such further funds belonged to them, inasmuch as they had not received an amount equal to that received by Kennedy, if he were bound to bring into account the sum of 10,122*l.*

It being considered incompetent for the appellants to enforce their rights as transferees of Norton's security in that action, the present action was instituted by the appellants against Sir

John Willoughby, Kennedy, Lord Henry Paulet's trustee in bankruptcy, the Capital Finance Company, E. J. Walker, Walkers, Parker & Co., Limited, and others, to enforce those rights; and the defendants in this action were enjoined from obtaining the transfer or payment of the funds in *Willoughby* v. *Paulet* until this action could be disposed of.

At the trial of this action North J., being of opinion that Norton's charge had been extinguished, came to a conclusion adverse to the appellants, and made an order (inter alia) declaring that the payments to Kennedy of 5122*l.* and 5000*l.* were to be treated as good payments. This order was affirmed by the Court of Appeal (Lindley and A. L. Smith L.JJ., Kay L.J. dissenting). (1) Against this decision the present appeal was brought.

1897. Nov. 11, 12. *Swinfen Eady Q.C.* and *Dauney* (*Edward Ford* with them) for the appellants. The appellants are entitled to stand in the place of Norton to the extent of all moneys due to him under the charge of September 21, 1888, and to receive payment out of the funds in court in *Willoughby* v. *Paulet* pari passu with the respondents Willoughby and Paulet without bringing into account the payments improperly made by Walker to Kennedy. Norton gave notice of his charge at once to Walker, and so did all that he was bound to do in protection of his charge. It must now be taken that the payments by Walker to Kennedy were made without Norton's consent or knowledge. There is no ground for the obiter dictum that because the other lenders had no notice of Norton's charge therefore he could not have shared rateably with them but must have treated the wrongful payments to Kennedy as good payments. Those wrongful payments could not deprive Norton of his right to share the fund pari passu with the other lenders. And Norton's right is now vested in the appellants, unless it has been extinguished by the deed of March 1893. By that deed Norton did not "release" his security, but "assigned" all his rights and interests to the appellants. For what conceivable reason could the appellants

(1) [1896] 1 Ch. 726.

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have intended to extinguish Norton's claim? The merger of it could in no circumstances have benefited them, whereas it might (if the view of the Court of Appeal as to the merger be right) be greatly to their prejudice. The decision in *Toulmin* v. *Steere* (1), originally unsound and often condemned, has no application to this case: see *Thorne* v. *Cann.* (2) The doctrine of merger has no bearing upon these facts: the simple question is, can payments which were clearly bad as against Norton be valid as against Norton's assignee? How could Norton's security be "merged" in what the appellants bought from Lord Windsor? Both upon the facts and the construction of the deed of March 1893, the appellants are entitled to stand in Norton's shoes.

Cozens-Hardy Q.C. and *Vernon Smith Q.C.* (*W. C. Druce* with them) for the respondents. First, Norton did not do all that he could and should have done to perfect his title; he should have given notice of the equitable assignment in his favour to Walkers, Parker & Co., Limited, and also to the other lenders, Willoughby and Paulet: see per Lord Cairns in *Shaw* v. *Foster.* (3) Not having given due notice, Norton could not have contended that the payments to Kennedy were wrongful. The agreement of June 1888 was in substance a contributory mortgage, and the fact that one of the contributory mortgagees may have partially realized his share of the security behind the back of his sub-mortgagee cannot deprive the other contributory mortgagees of their full shares of the security, and the appellants cannot be in a better position than Norton himself. Secondly, upon the construction of the deed of March 1893 the Court of Appeal came to the right conclusion. The intention to extinguish Norton's interest appears from the deed and the circumstances, so that the appellants might obtain Kennedy's interest free from incumbrances. If it had been intended to keep alive Norton's security, that would have been expressed. The deed does not even state how much was due to Norton.

Swinfen Eady Q.C. replied.

(1) (1817) 3 Mer. 210. (2) [1895] A. C. 11.
(3) (1872) L. R. 5 H. L. 321, 338.

The House took time for consideration.

1898. March 18. EARL OF HALSBURY L.C. My Lords, the facts out of which this appeal arises may be very simply stated. The business and assets of a mercantile firm were for sale in the year 1888, and a Mr. Walker had procured the sale to himself of the business and assets for the sum of 502,000*l.* He was, however, under the obligation of bringing into court the sum of 25,000*l.* This he did not possess, and accordingly he procured the assistance of Lord Henry Paulet, who advanced 9000*l.*; Sir John Willoughby, who advanced 10,000*l.*; and Mr. Arthur Kennedy, who advanced 6000*l.* This 25,000*l.* was advanced under a bargain, among other things, that the lenders should be repaid their advances rateably, together with certain other advantages in proportion to their advances. The whole arrangement assumed that Walker was to manage the whole adventure and to be the recipient of the money paid, and to distribute it in pursuance of the agreement when obtained.

Three months after the date of this agreement Kennedy, who had advanced 6000*l.*, charged his interest in the agreement to one Norton for the sum of 6200*l.* Of this charge Walker received due notice, and at the beginning of the following year Walker succeeded in reselling the property for 850,000*l.* In the April following Walker, notwithstanding Norton's notice, thought proper to hand over to Kennedy 5122*l.*, and conveyed property to him which is assumed to be worth 5000*l.* I do not understand it to be denied that this payment or, to speak more accurately, this handing over to Kennedy of what Walker had received, notwithstanding his knowledge of Norton's charge, was a breach of Walker's duty—something he had no right to do, for which he had not received any authority from Norton, and of which, indeed, Norton had no knowledge.

My Lords, I desire to treat this part of the case as entirely independent of questions which arise upon further arrangements by Kennedy a year afterwards. But, stopping at this point, I am unable to understand in what way Walker's improper use of his possession of the property realized by the resale can affect Norton's rights, or any person claiming under Norton. If

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instead of handing it over to Kennedy he had been robbed of it, and all that remained of the property was insufficient to pay all the persons having rights under it, why should Kennedy's assignee be in a less favourable position for receiving his proportionate amount because the whole fund had been diminished by the unlawful act of the robber? Can it make any difference that Walker, in defiance of his duty, thought proper to divert a certain sum of money from the gross fund in favour of Kennedy at a time when to his knowledge Kennedy had no right to receive it? What Norton, in right of Kennedy's previous rights, was entitled to was the amount of his debt from Kennedy; and why Norton should be selected as the victim of a loss to which he in no way contributed I am unable to understand.

Lindley L.J. uses the phrase that he did not understand why Norton's loss should be thrown on the other adventurers. It appears to me that the words "Norton's loss" involve the fallacious assumption that in some way or another the share which had once belonged to Kennedy, and which by the hypothesis at the time of the handing over to Kennedy no longer belonged to him, must be so ear-marked as already Norton's that it becomes Norton's loss; but this, I think, is erroneous. If the whole fund created has been pro tanto diminished by an unlawful act of the person who by the agreement of all the parties was the custodian of the money and the person through whose hands it was to be distributed, it appears to me that the observation to which I have referred might be retorted, and it might with propriety be asked: Why should the part of the loss which was a loss to the whole fund be appropriated to one particular adventurer, or the assignee of that adventurer? No one has ever yet explained what Norton did or what Norton omitted to do which made him more responsible for a loss of any part of the fund than any other one of the adventurers; and I am, therefore, of opinion that on this part of the case the judgment of the majority of the Court below is erroneous.

My Lords, so far, although I respectfully dissent from the conclusion, I understand the argument. The money and property handed over to Kennedy are assumed to be payments to

Kennedy which he had a right to receive, and by that process Norton's claims were pro tanto defeated.

I fear that with respect to the remaining part of the case I have some difficulty in understanding the ground of the decision. Kennedy in 1890 executed a deed assigning to Lord Windsor whatever he was entitled to under the original bargain of 1888. As I have already said, I think he was entitled to nothing at the date of that assignment except what remained to him after discharging the debt due to Norton. By a subsequent deed, through the medium of a company called the Capital Finance Company, Limited, the present appellants purchased Lord Windsor's interest and Norton's interest under the original bargain of 1888. Lord Windsor took, and could only take, from Kennedy what Kennedy had left after his assignment to Norton. But the appellant company purchased for 1000*l.* Norton's interest, which had been created by Kennedy on September 21, 1888. Some litigation had arisen in which Norton's rights were held not to be capable of being enforced, and accordingly this action was brought to enforce those rights against the funds that had been deposited in court, the practical question in the cause being whether in taking the account of what was due to Norton the moneys and property handed over to Kennedy could be taken into account as being payment of Norton's claim.

I am unable to follow the reasoning for one or two grounds. In the first place, the thing assigned and of which title was conveyed to Lord Windsor was not the whole sum, and could not have been the whole sum, which was due to Kennedy under the original bargain, but only so much of it as remained after providing for 6200*l.* due to Norton. The thing assigned by Norton was that original sum, and I am unable to follow what merger is supposed to arise when Norton sold one sum of money or the right to it, and Lord Windsor sold another sum of money or the right to it. So far as the deed itself is concerned, I can see no indication of anything but an intention of two different vendors to sell two different things to the same vendee. Nor am I quite certain that I understand what is meant by extinguishing Norton's interest, or how, if such a

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thing could be done, there is any indication of any intention to do it. Norton's title to what he originally got seems to me to be untouched by anything disclosed in the course of the narrative. He has sold that interest to the appellant company for 1000*l.*; and it appears to me, therefore, that the appellants are entitled to a decree for that interest whatever that may be; and in arriving at that amount it is wholly impossible to treat the moneys handed over to Kennedy as moneys paid to Norton.

I am, therefore, of opinion that the judgment of the Court below ought to be reversed and the account taken upon the basis I have described, namely, that up to the amount which is due to Norton the appellant company are entitled to obtain their proportionate amounts of what is due under the bargain of 1888; and I move your Lordships accordingly. The respondents of course must pay the costs both here and below.

My Lords, my noble and learned friend Lord Shand, who is not able to be present to-day, asks me to say that he concurs.

LORD HERSCHELL (after stating the facts above set out). My Lords, in delivering the judgment of the majority of the Court, Lindley L.J. said: "Why the other lenders are to suffer by reason of Walker's wrongful payments to Kennedy after notice of Norton's charge is by no means obvious . . . . We fail to understand how Norton could as against the other lenders claim more of the fund than Kennedy's share of it, after giving credit for the payments made to him. The other lenders had no notice of Norton's security, nor could they have prevented Walker from paying Kennedy. Under these circumstances the plaintiffs' contention that Norton had any such right as they allege does not commend itself to our sense of justice, nor to our notions of equity." Although the judgment of the Lords Justices was not founded on this point, it is necessary in the view which I take of the case to deal with it, and the more so as it seems to me not to have been without its influence upon the Lords Justices when disposing of the other part of the case.

I find myself quite unable, with all deference, to concur with the view indicated by the Lords Justices in the part of the

judgment which I have quoted. I do not understand what is meant by saying that Norton was not entitled to throw upon the other lenders any part of the loss sustained by him by reason of Walker's wrongful payments to Kennedy. Kennedy having assigned his interest to Norton, and Norton having given notice of this assignment to Walker, any payment subsequently made by him to Kennedy could, as it seems to me, have no more effect as against Norton than if it had been made to a stranger. In that case I do not suppose that anyone would contend that such a payment could affect Norton, or diminish in the least the sum which he was entitled to claim as his share of the payments to be made out of the purchase-money received by Walker. That sum was determined by the assignment by Kennedy to Norton of his entire charge upon the purchase-money as a security for 6200*l*. If any portion of the money charged was employed by Walker otherwise than in accordance with the rights which Norton or the other lenders or their assignees possessed, I fail to see how this can affect the respective claims of Norton and the other lenders. The notion that Norton's rights could be affected because a payment was wrongfully made to his mortgagor does not appear to me to rest on any sound foundation. I can see nothing unjust or inequitable in holding that where a person, in possession of a fund on which others have charges, has received notice of an assignment of his rights by one of the persons entitled to a charge, and nevertheless makes payments to the assignor, the rights of the several persons entitled to the charge, to what remains of the fund, cannot in any way be affected by such payments. Indeed, it seems to me that it would be quite unreasonable that the assignee of a charge, who has given notice of the assignment, should be held affected by transactions taking place behind his back with the assignor. To speak of Norton throwing on the other lenders the loss sustained by him by reason of Walker's wrongful payments assumes that the loss was Norton's. It is here that I differ. I do not think that it was, for I do not see how an assignee can be made responsible for a wrongful act of the assignor after notice of the assignment has been given.

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Before considering the terms of the deed of March 17, 1893, it will be well to point out what was the interest originally vested in Kennedy by the agreement of June 20, 1888, and what were the rights which Norton possessed at the time of the execution of the deed which has to be construed, and also what were the rights which Lord Windsor and Forrest acquired under the assignment by Kennedy. I think this aspect of the case has a material bearing upon the construction of the deed, and has been somewhat lost sight of in the judgment of the Lords Justices. The right which Kennedy acquired by the original agreement was to receive 12,000*l.* out of the surplus of the purchase-money coming to E. J. Walker beyond what was necessary to satisfy the original vendors. By the assignment to Norton he acquired this right to the extent of 6200*l.*, or so much of that sum as from time to time remained unpaid. This was the right which he possessed when he executed the deed of March 1893. For the reasons I have given, I think his right was wholly unaffected by the payments wrongfully made to Kennedy. Lord Windsor, on the other hand, took from Kennedy by assignment on August 7, 1890, all the moneys then receivable or recoverable by him under the original agreement. Kennedy having at that time received the 10,122*l.* already referred to, the right which Lord Windsor acquired from Kennedy's assignment obviously extended only to such sums as Kennedy was entitled to receive from the fund charged after taking into account a receipt by him of 10,122*l.*

Bearing in mind, then, that these were the respective rights of the parties to the deed who concurred in assigning their rights to the appellant company, I pass to a consideration of the provisions of the deed. The terms of the assignment by Norton are unambiguous. In respect of his rights, powers, benefits, and interest under the agreement of September 21, 1888, and as mortgagee, he assigns to the appellants all his estate and interest of and in the interest formerly of Kennedy in or under the agreement of June 20, 1888, and the moneys and bonuses thereby secured. These words are manifestly apt to vest in the appellant company the right which Norton then possessed, which was, as I have pointed out, to receive out of

the fund charged so much as was necessary to satisfy the debt then due to Norton up to 6200*l.* pari passu with the other lenders under the original agreement, on the basis of no part of Kennedy's claim under it having been at that time satisfied. This is not denied. But the majority of the Lords Justices held that the interest transferred by Norton was transferred in order to be extinguished, so that the appellant company might obtain Kennedy's interest in the security of June 1888 free from incumbrances. The Lords Justices thought that the intention of the parties to extinguish Norton's interest was to be found in the terms of the deed and the circumstances under which it was executed; and they rested their decision on the law laid down by Sir George Jessel M.R. in *Adams* v. *Angell.* (1)

In that case the learned judge stated the effect of the doctrine originally enunciated in *Toulmin* v. *Steere* (2), that where the purchaser of an estate pays off an incumbrance upon it the incumbrance paid off is merged unless the contrary intention appears, and he pointed out its application in the case of an owner in fee, or in tail, or of a purchaser. It is to be observed that the doctrine referred to is founded on the principle of merger. The assignment of an incumbrance to an owner or purchaser of an estate does not transfer any new estate: it only frees from the incumbrance an estate already vested in him, or about to be vested in him, by conveyance. As Sir George Jessel points out, the assignment to a purchaser of an estate of an equitable charge upon it really passes nothing. It may nevertheless be treated as remaining on foot for the purpose of protecting the purchaser against mesne incumbrances.

In view of the nature of the interests assigned by Norton and Lord Windsor respectively, to which I have called attention, I find it difficult to understand how the doctrine of merger, on which *Toulmin* v. *Steere* (2) rested, can have any application to the present case. Assuming the appellant company to be purchasers from Lord Windsor, what was the nature of the so-called "property" which they purchased? It could be no more than

(1) (1877) 5 Ch. D. 634. (2) (1817) 3 Mer. 210.

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this—the right which Kennedy possessed on August 7, 1890, under the agreement of June 1888. What was vested in Norton, and what he assigned, was the right which Kennedy possessed on September 21, 1888, under the agreement just referred to, to the extent necessary to satisfy the debt due to Norton. How could the right which Norton thus assigned merge in what the appellants bought from Lord Windsor? It seems to me that it can only be necessary to shew an intention to keep alive that which would otherwise cease to exist by reason of merger. In any other case the assignment of itself vests the right assigned in the assignee, and it remains in him unextinguished. But, further, I am unable to see any ground for the conclusion that Norton's interest was transferred in order to be extinguished. There is, in my opinion, nothing on the face of the deed, or in the nature of the transaction, to shew such an intention. If this had been the intention, I think, having regard to the nature of the interests possessed by the parties to the conveyance, the instrument would have been differently framed. Reliance was placed by the majority of the judges in the Court below on what was called "the speculative character of Norton's claim against the other lenders," and in another part of the judgment it was said that "the opportunity of making a very doubtful claim against third parties" was not such a benefit as to give rise to the presumption of an intention to keep alive Norton's charge. I think these expressions indicate an erroneous view of the nature of Norton's rights. In my opinion, no claim of Norton against third parties, by which is meant the other lenders, is in question. Nor do I think his rights are open to any doubt. He was entitled to claim payment to the amount due to him out of the fund in Walker's hands in respect of Kennedy's original charge pari passu with the other lenders who had a charge on that fund. If a part of this fund had been improperly applied by Walker, and the fund thus diminished, Norton was entitled, in virtue of the assignment of Kennedy, to a rateable proportion of what remained pari passu with the other lenders. He was no more affected by its improper application than they were, and there is no more reason in point of law, or as it seems to me in point of

justice or equity either, why the loss should fall on him rather than on them. For these reasons I am unable to see any ground for holding that the assignment to the appellant company by Norton of all his rights in Kennedy's interest under the agreement of June 20, 1888, and the moneys and bonuses thereby secured, did not vest that entire interest in them, and give them precisely the rights which he possessed at the time of the conveyance. If it were necessary to hold that Norton's right was kept alive under the conveyance of 1893, there appears to me ample reason for so holding, inasmuch as it would be obviously for the benefit of the appellant company to keep alive Norton's interest, so that they might not be affected by any transactions of Kennedy subsequent to his assignment to Norton, and prior to his assignment to Lord Windsor.

For these reasons I think the judgment of the Court below ought to be reversed, and that the order made by North J. on July 10, 1895, should be varied by stating that the payments to Kennedy are not to be taken into account in ascertaining the amounts to which the plaintiffs are entitled in respect of Kennedy's interest under the agreement of June 20, 1888, until the plaintiffs have received an amount equal to the sum which was on March 17, 1893, due to Norton. I think the respondents must pay the costs in this House and in the Courts below.

Lord Macnaghten. My Lords, I am of the same opinion.

In support of the judgment under appeal the respondents relied upon two grounds. Either of the two, if established, would serve to defeat the appellants' claim. In the first place, they contended that Norton had not given due notice of the equitable assignment in his favour, and that consequently, as against them, Norton's assignees could not be heard to say that the payment to Kennedy was an improper payment. In the second place, they argued that the deed of March 17, 1893, by which Norton assigned his interest to the appellants, destroyed that interest, and extinguished Norton's security altogether. In both the Courts below the first ground was rejected; in both the second was held good, though Kay L.J. dissented.

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On the first point it is not necessary to say much. The assignment to Norton by Kennedy of the moneys coming to him from Walker was dated September 21, 1888. It is not disputed that notice of the assignment was given to Walker on October 24 following. What more ought Norton to have done? It was said that notice might have been given to the company, who were the ultimate purchasers, and who were bound to pay Walker the balance of their purchase-money after satisfying the original vendors. But such a notice would not have prevented the company paying Walker what was due to him. It would not have made Norton's position more secure in the event of the company paying Walker, nor would it have thrown any liability on the company in the event of Walker misapplying the money. It might or might not have led the company to hold their hand for a time in order to give Norton an opportunity of intervening by some application to the Court if he were so advised. But everybody concerned was anxious that the money should come to Walker's hands. Everybody looked to Walker as the paymaster. Then it was said that notice might have been given to Kennedy's associates, the other two subscribers. I do not say that under the circumstances that might not have been a prudent precaution. It might perhaps have prevented the particular misapplication of the fund which is now complained of. I am not sure that it would. But Norton was not bound to give such a notice. By his notice to Walker he did all that lay in his power to perfect his title, to use a common phrase. He did what he could to lay hold of the fund, and to convert Walker into a trustee for him of Kennedy's share to the extent of his interest therein. Payment to Kennedy after that notice was a payment which Norton, so long as he had an interest in the fund, was not bound to recognise. As far as he was concerned, it was no payment at all. Walker might just as well have given the money to an utter stranger, or thrown it into the sea. The appellants have obtained an assignment of Norton's rights and interest. If they have not renounced those rights or destroyed that interest, surely they are entitled to take up the position which Norton would have occupied, and to say what Norton might have said. They are not asking the

other subscribers or those who derive title from them to refund. They only say, "You have received so much on account. We have received nothing as yet. Before you receive anything more, this inequality must be redressed. To the extent of our interest derived from Norton we are entitled to be paid rateably and pari passu." That was the agreement between the subscribers. I cannot see anything unjust or inequitable in the conduct of the appellants. They are merely endeavouring to enforce a bargain in which they have obtained a substantial interest. If the appellants are right in their facts, Walker as well as Kennedy wronged Norton, and wronged the respondents too. The respondents were innocent of all blame; so was Norton; so are the appellants. There is no reason that I can see for altering the original arrangement to the advantage or detriment of the one party or of the other.

So much for the first point. I find more difficulty in dealing with the second, because I am not quite sure that I follow the reasoning on which the judgment of the Court of Appeal is founded. The judgment begins by stating the facts and circumstances which led up to the deed of assignment of March, 1893. Among other things, it refers to three instruments—Lord Windsor's title-deeds. "Under these instruments," says the Master of the Rolls, "Forrest" (Forrest was trustee for Lord Windsor) "had a power of sale." I may observe in passing that all the judges in the Court of Appeal, following, I think, a statement by North J., who, however, guards himself by saying that the deed had not been produced, take for granted that there was a power of sale in Lord Windsor's securities, and the argument at the bar proceeded on that assumption. I may also note that the deed of June 18, 1891, which was one of Lord Windsor's three deeds, seems to have nothing to do with the interest assigned by Lord Windsor or Forrest to the appellants. The reference to it in the deed of March 17, 1893, is, I think, a mistake.

After stating the facts, the judgment under appeal goes on to deal with some of the more recent cases about the doctrines of equity as to the merger of securities. Those doctrines, however, appear to me to have little or no bearing on the question

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at issue. And then the following passage occurs: "The speculative character of Norton's claim against the other lenders, the absence of all allusion to the existence of any such claim, the absence of any assignment of his debt, the ignorance we are in even now of the amount due to him (for it is admitted that 6200*l.* is not), the recital of the agreement with Lord Windsor, and, lastly, the unusual clauses which follow the habendum, lead us to the conclusion that it was intended to extinguish Norton's claim, and not to keep it alive except in the event of the plaintiffs failing to obtain a good title under a valid power of sale. In that event, no doubt, as Kennedy would have a right to redeem, both Norton's and Lord Windsor's charges would have to be treated as subsisting. What the plaintiffs, however, wanted was to purchase Kennedy's interest free from incumbrances under a power of sale. The recitals shew that the real transaction was a sale by Lord Windsor under his power; but 1000*l.* of the purchase-money was to be paid to Norton to get rid of his claim."

Now I cannot help thinking that, in dealing with the complicated facts before them, the Court has fallen into an error—an error which goes to the root of their decision. The charge in favour of Lord Windsor was in the form of a trust for realization and sale. It contains an assignment of the mortgaged property, with a power of attorney in favour of the assignee. The trust is to receive the moneys receivable by Kennedy under the agreement of June 20, 1888, and to receive and sell, or otherwise convert into money, all stocks, shares, and other things receivable or recoverable by Kennedy under that agreement. That, no doubt, is an authority to sell for the purpose of realization everything received or recovered under the agreement of June 1888 not at the time in the shape of money. But it is not, as it seems to me, a power for the mortgagee to sell the mortgaged property before it comes into his hands. Lord Windsor could, of course, sell his security in any way he chose, for any consideration he pleased, great or small; but without the mortgagor's concurrence such a sale as against the mortgagor would only be a transfer of the security, and not, as it is treated in the judgment, and as it was treated

at the bar, a sale under a mortgagee's power of sale. This objection, if it is well founded, seems to me to dispose of the judgment of the Court of Appeal, or rather to convert it into a decision in favour of the appellants.

But I must say I should have thought the judgment erroneous if Lord Windsor's securities had contained a special power of sale. "There is no doubt," says the Master of the Rolls, in the judgment under appeal, "that this deed" (that is the deed of March 1893) "was intended to transfer and did transfer to the plaintiffs all Norton's interest in the security of June 1888; but the question is whether the interest so transferred was transferred in order to be extinguished so that the plaintiffs might obtain Kennedy's interest in the security of June 1888 free from incumbrances, or whether Norton's interest was so transferred as to enable the plaintiffs to treat it as still subsisting so as to confer upon them rights against third parties which Lord Windsor and Forrest could not confer. The answer to this question depends upon the intention of the parties at the time, and that intention must be found from the terms of the deed and the circumstances under which it was executed." To that proposition, as it seems to me, no exception can be taken. But what is the answer which the deed and the surrounding circumstances suggest? The best answer that can be given is, I think, to be found in the judgment of James L.J. in a well-known case—*Locking* v. *Parker*. (1) One Lysimachus Parker had been for forty years in possession of a mortgaged estate without any acknowledgment of the mortgagor's title. The mortgage was in fee and in the form of a trust for sale. After the mortgagor's death his devisees brought a suit for the execution of the trusts contained in the mortgage deed. The defence was two-fold: (1.) the transaction was nothing more than a mortgage; and (2.) the defendant was entitled to the protection of two old mortgage terms which had not been surrendered when the mortgage in fee was executed. Lord Romilly, Master of the Rolls, rejected both grounds of defence; he held that there was a trust which was an answer to the Statute of Limitations, and also that the

(1) (1872) L. R. 8 Ch. 30.

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terms had ceased to exist though not formally surrendered. They were, he said, "superseded by the provisions" of the mortgage in fee "which were inconsistent with the subsistence of those terms." The judgment, however, was reversed on both points in the Court of Appeal. As to the latter point, "it is quite clear," said James L.J., "that in this deed there is no express surrender of the terms. They are not referred to as intended to be surrendered, and the gentleman who had the terms in him did not concur in conveying so as to merge them in the inheritance. It has been urged, however, that there is an implied surrender of them by virtue of the provisions of the deed. Now, it is always to be borne in mind that when the Court implies from a deed anything that is not expressed in it, this is done for the purpose of getting rid of some technicality which interferes with what is obviously the plain intent and meaning of the parties to the transaction. Of course, if we could see from the deed itself that it was the intention of the parties that the earlier securities should not be kept on foot we might give effect to that intention. To my mind Lysimachus Parker would have been demented if he had surrendered his terms, and so lost the benefit of his old securities, all of which are referred to in this deed without any expression of an intention to merge. I am of opinion, therefore, that there was no surrender or merging of the existing terms, and that there was nothing in the deed which deprived the mortgagee under the earlier deeds of his rights under them."

My Lords, if in that case the Court would have held Lysimachus Parker demented to have thrown away the benefit of his old securities, what would you say of the conduct of the appellants if they had deprived themselves of the advantage and protection of Norton's charge? What words would have adequately described such folly? Observe what they knew. They knew that the fund was 12,000*l.* originally. So far as appears there were only two charges upon it, separated by an interval of nearly two years. Norton was content to take 1000*l.* for his security. Lord Windsor asked no more for his, though his debt was over 15,000*l.* So that evidently, somehow or other, the fund had been melting away, and there was all the

more need for caution. They knew that charges of this sort rank according to priority of notice. For the deed recites the notice given by Norton, with the particulars of its date and the acknowledgment of it by Walker—it is a separate recital apparently introduced for some purpose. Then the charge is duly assigned to the appellants. There was no reason for extinguishing it; there is no expression of any intention to extinguish it; and yet we are to presume that, without any reason, the appellants, who were paying 1000*l.* in hard cash, deliberately and intentionally threw their purchase away. I can understand the owner of an estate preferring to have it discharged from an incumbrance though the incumbrance be his own property, but I cannot understand a person entitled to several charges on a money fund, which must rank in priority according to date of notice, sweeping away the earlier charges and trusting to the last, though it might seem large enough to exhaust the fund, and though there might be apparently nothing behind it.

Some stress was laid on the circumstance that Norton's debt is not assigned. There might perhaps be something in that point if the deed had contained an assignment of Lord Windsor's debt. There is no assignment of either the one or the other. They are both treated alike. I do not see why more weight should be given to the absence of an assignment in the one case than in the other. Some stress, too, was laid on the clauses at the end of the deed referring to the possible existence of a special power of sale in both or in one of the charges assigned. Those clauses are certainly unusual. I think they are nothing but a blunder. There was no power of sale in either charge. The draftsman of the deed does not seem to have thought there was really. There is no recital of any power of sale, nor do the assignors purport to assign under any power, nor is the assignment in the form which such a power would suggest. The assignment is only an assignment of the estate and interest of the incumbrancers. If the deed could operate as a conveyance under a power of sale in Norton's charge, the appellants would not be bound to bring into account the improper payments to Kennedy so far as their interest derived from Norton is concerned. If it could operate as a conveyance on a sale under a

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power contained in Lord Windsor's charge, the sale could only take effect subject to the prior charge in favour of Norton, so that it would be just the same question over again. I do not think that these clauses have any bearing on the question at issue.

I am of opinion that the judgment under appeal must be reversed so far as it deprives the appellants of the benefit of Norton's charge, and I think that the respondents must pay the costs both here and below.

LORD MORRIS concurred.

Lords' Journals, March 18, 1898. (1)

Solicitor for appellants: *Howard Rumney.*
Solicitor for respondents: *Dawson, Bennett & Ryde.*

(1) The terms of the order were not finally settled when this report went to press.

[PRIVY COUNCIL.]

HILL, CLARK & CO. . . . . APPELLANTS;

AND

DALGETY & CO. . . . . RESPONDENTS.

J. C.*
1897
Nov. 24, 25; *Dec.* 15.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Crown Lands Act, 1889, s. 8, *sub-s.* 6—*Special Case stated by Land Court—Duty of Supreme Court.*

Held, that under the Crown Lands Act of 1889 (53 Vict. No. 21), s. 8, sub-s. 6, it is the duty of the Supreme Court to hear a case stated by the Land Court in pursuance of that sub-section, and to return it to the Land Court with a decision on the question submitted. The Land Court has jurisdiction to state it; and if stated without due precision, the Supreme Court can return it for amendment.

APPEAL from an order of the Supreme Court (August 12, 1896), which refused to hear and dismissed without hearing a special case stated for its decision by the Land Court under the Rabbit Act, 1890 (54 Vict. No. 29) and the Crown Lands Acts, 1884 and 1889, on the ground that the Land Court had no jurisdiction to state such case on the requirement of one of the parties in a matter arising under the Rabbit Act.

The respondents in September, 1894, served notice of demand on the appellants, the present owners of Pulpulla holding, for 703*l.* 15*s.*, one-half the cost of making a rabbit-proof fence along the boundary between the holdings of Gidgee and Pulpulla. The claim came before the Land Board of Cobar, and it appeared that the respondents had already twice taken proceedings against former successive owners of Pulpulla to recover the same sum in respect of the same fence. The first claim was against Messrs. Josephson & Nisbet in 1892, and was dismissed by the Land Board, but was carried by the respondents by way of appeal to the Land Court. In July, 1893, however

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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(the fence being at that time complete), the appeal and proceedings were abandoned by the respondents. They afterwards made a claim against Josephson (who had become sole owner of Pulpulla) alone; but in October, 1893, this claim also was abandoned at the hearing before the Land Board.

The Land Board dismissed the claim against the present appellants. The respondents appealed to the Land Court, which held that, there having been no assessment upon the former owners, the respondents were entitled under the Act to recover from the appellants, and that the former proceedings and what had occurred therein were no bar to the claim, and directed the Land Board to proceed accordingly.

The appellants contended that they are not liable in law under the circumstances for the erection of the fence in question, and accordingly, under s. 8, sub-s. 6, of the Crown Lands Act of 1889 and the Land Court Rules, required the Land Court to state a case for the decision of the Supreme Court, which was done.

At the hearing thereof the respondents objected that the Supreme Court had no jurisdiction, inasmuch as it was not competent for the Land Court under the Rabbit Act to state a case for the decision of the Supreme Court on the requirement of any of the parties, and the Supreme Court allowed the objection, refused to hear the case, and ordered it to be dismissed.

Sir R. Reid, Q.C., and *Vaughan Hawkins*, for the appellants, contended that it was the manifest intention of the Rabbit Act of 1890 (see ss. 3, 4, 5, 12, 20, 23 and 46) that questions of contribution to rabbit-proof fences should be determined by the same machinery as questions of contribution to boundary fences generally under the Crown Lands Acts. For that purpose—that is, of proceedings under the Rabbit Act—the Land Court had all the powers conferred by those Acts, including those conferred by s. 8, sub-s. 6, of the Act of 1889. Those powers relate to procedure on appeals to the Land Court within the meaning of s. 8, sub-s. 2; and on the true construction of s. 5, sub-s. 3, of the Rabbit Act, an appeal to the Land Court is

given subject to those powers. There is nothing in the Rabbit Act of 1890 which excludes the application of s. 8, sub-s. 6, to proceedings thereunder.

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Swinfen Eady, *Q.C.*, and *Upjohn*, *Q.C.*, for the respondents, contended that under the Rabbit Act, 1890, there was no right of appeal from the decision of the Land Appeal Court. Nor was there any right thereunder to require a case to be stated. In any event, and assuming that the case falls within s. 8, sub-s. 6, the appellants did not state a case containing any question of law within the meaning of that sub-section; or if they did, it was too late after the decision of the Land Court of Appeal had been given. On the merits the Land Court was right, for the liability of the appellants to contribute as prayed was clearly established.

1897 Dec. 15.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. This is an appeal from an order of the Supreme Court of New South Wales of August 12, 1896, dismissing a special case which had been stated for its opinion by the Land Appeal Court of New South Wales and refusing to answer the question asked therein on the ground that the Land Appeal Court had no jurisdiction to state the special case. By s. 4 of the New South Wales Rabbit Act of 1890 it is enacted that "The Land Court and the Local Land Boards shall perform the duties respectively imposed upon it and them under this Act and the respective jurisdictions of the said Court and of the said Boards are hereby extended accordingly." And s. 5 (ii.) enacts: "The provisions of the said Acts" (Crown Lands Acts) "in regulation of the procedure before a Board and upon appeals and references to the Land Court thereunder shall so far as possible be applied." One of these provisions is in s. 8 (vi.) of the Crown Lands Act of 1889 (53 Vict. No. 21) and is as follows:—

"Whenever any question of law shall arise in a case before the Land Court the Land Court shall if required in writing by any of the parties within the prescribed time and upon the prescribed conditions or may of its own motion state and submit a case for decision by the Supreme Court thereon which decision

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shall be conclusive. Every such case shall purport to be stated under this section and shall state the names of the persons who are parties to the appeal reference or other proceeding and shall be transmitted to the Prothonotary of the Supreme Court to be dealt with as to the setting down of the case for argument and the hearing of the same and its return with the decision of the Supreme Court thereon as the judges or any two of them shall direct. The Supreme Court for the purposes of this section may consist of two judges only and shall have power to deal with the costs of and incidental to any case stated under this section as it may think fit."

In an appeal in the Land Appeal Court by the respondents against the dismissal by the Local Land Board of Cobar of an application by them against the appellants for a contribution of the half cost of the erection of a rabbit-proof fence a case was stated by the Land Appeal Court at the request of the appellants in pursuance of the above sub-section of s. 8. This is the case which was dismissed by the Supreme Court.

It appears to their Lordships to be clear that the stating this case is part of the procedure of the Land Court in the appeal to it, and that it is also clear that it was the duty of the Supreme Court under sub-s. 6 of s. 8 of the Crown Lands Act to hear the case and return it to the Land Court with a decision on the question submitted. In the opinion of their Lordships, the Supreme Court was in error in holding that the Land Appeal Court had no jurisdiction to state the case. In the 14th paragraph of the case it appears that there was a question of law, namely, whether, there having been no assessment by the Land Board under proceedings which as stated in the case had been taken against former owners of the same property, such proceedings were a bar to proceedings against the appellants. In paragraph 15 of the case it is said that the question for consideration of the Supreme Court is "whether the Land Appeal Court was right in sustaining the appeal upon the grounds set forth in paragraph 14 hereof and directing the said Board as therein expressed." It may be that this is too general and does not state the question of law so precisely as it might have been stated; but the Supreme Court could have returned

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the case to the Land Court to have this amended. It did not affect the power of the Supreme Court to hear it or make the proceeding an appeal generally upon the whole case, which apparently in the reasons given by the learned judges they considered it to be. Their Lordships will therefore humbly advise Her Majesty to reverse the order of the Supreme Court and direct it to hear the case, and return it with the decision of the Court thereon to the Land Court. The respondents will pay the costs of this appeal.

Solicitors for appellants: *Light & Galbraith.*
Solicitors for respondents: *Bell, Brodrick & Gray.*

[PRIVY COUNCIL.]

In re CURRIE AND TIMMIS' PATENT.

J. C.* 1897 Dec. 9.

Prolongation of Term for Ten Years—New Patent.

Where it appeared that an invention was of considerable merit, that there were great difficulties in introducing it, and that the petitioner had incurred loss in his endeavours so to do, their Lordships recommended a new patent for the term of ten years.

THIS was a petition by Timmis for an extension for fourteen years or other period of the term of sole using and vending an invention of "improvements in the means for working and interlocking railway signals by electricity" which had been granted by letters patent dated December 12, 1883, to the petitioner and Currie.

It stated that subsequent letters patent for the same invention had been granted in various foreign countries and the Colonies, which had been allowed to lapse, no profits having been made in respect thereof; that in 1890 all the patents came by assignment into the sole ownership of the petitioner. The invention was to operate the signal arms of railway signals by electrical energy instead of mechanical; but the petition stated

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

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CURRIE AND TIMMIS' PATENT, *In re.*

that owing to its being entirely novel and untried, and to the disastrous results to be apprehended from any failure in the signalling apparatus on a railway, no railway company would try it until 1891, when the Liverpool Overhead Electric Railway was made. For the last four years that railway had been fitted with the petitioner's invention, which had proved to be reliable, economical, and satisfactory in every respect. With that exception and another at Swansea, the invention had not come into commercial use, and losses had resulted to the petitioner from his endeavours to introduce it.

Bousfield, Q.C., and *Graham*, for the petitioner, relied on the merit of the invention and explained its non-user. They submitted that, owing to exceptional circumstances, it could only be gradually appreciated; that the experience gained on the Liverpool Railway Company was diminishing the objections entertained by railway companies to its introduction; and that a further term of fourteen years would not be more than sufficient to ensure fair remuneration to the petitioner.

Sir R. E. Webster, A.-G., and *Sutton*, for the Crown, referred to *Herbert's Patent* (1) as to the effect of non-user of the patent, which, however, it was admitted must depend upon the circumstances of each case.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. Their Lordships are of opinion that the petitioner has established two points of very considerable merit in his invention, the one being that it can operate at a distance quite unattainable by any prior system, and the other being that it has the effect of releasing as well as locking the signal arms; and it is also quite clear and not disputed that he has not only received no remuneration, but has undergone very considerable loss in his continued efforts to bring his invention into operation. With respect to his want of success their Lordships appreciate what has been said of the great difficulty there is in the way of the introduction of such a system, that the ground is occupied by the machinery of other systems, and

(1) (1867) L. R. 1 P. C. 402.

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the new system could not be introduced except at very great expense, and they appreciate the difficulty which has been mentioned of erecting generating machinery, in new countries especially, before Mr. Timmis' patent can be brought into working. Therefore their Lordships are of opinion that it is a proper case for them to advise Her Majesty to grant an extension of the term, and, under the circumstances, having regard to the great difficulties that exist, and to the certainty that it can be only very gradually introduced, and perhaps only in the case of new railways, they think that ten years will not be too long a time for the extension of the patent. A new patent to the petitioner will be granted for that term.

Solicitors for petitioner: *Fallows & Rider.*
Solicitor for the Crown: *Solicitor for the Treasury.*

[PRIVY COUNCIL.]

J. C.* 1897 *Nov.* 23, 24; *Dec.* 15.

NEW ZEALAND LOAN AND MERCANTILE AGENCY COMPANY, LIMITED } DEFENDANTS;

AND

CHRISTINA MORRISON . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Imperial Joint Stock Companies Arrangement Act, 1870, *inapplicable to the Colonies—Non-assenting Victorian Creditor—Effect of Scheme of Arrangement.*

Held, that the Joint Stock Companies Arrangement Act, 1870, does not apply to the Colonies.

Accordingly a scheme of arrangement thereunder sanctioned by an English Court is quoad the Colonies a proceeding in a foreign court, and cannot be pleaded by the company in a Victorian Court as a defence to an action by a non-assenting Victorian creditor for the full amount of her claim.

Gibbs v. *Société des Métaux*, (1890) 25 Q. B. D. 399, approved.

APPEAL from two orders (Sept. 1, 1896) by the Supreme Court, one dismissing an appeal by the appellants from an order

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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made by Hodges J. (August 7, 1895) in favour of the respondent on certain points of law raised by the pleadings, and the other dismissing an appeal by the appellants from the judgment of Madden C.J. (October 6, 1895) at the trial of the action.

The main question was whether an arrangement made under the Joint Stock Companies Arrangement Act, 1870, agreed to by the statutory three-fourths majority of all the creditors in the winding-up of an English company, carrying on business, amongst other Colonies, in Victoria, and sanctioned by an order of the Court in England, affords a good answer to an action brought in Victoria by a non-assenting creditor to recover a loan made in Victoria by such creditor to the company before the winding-up thereof. In other words, the question was whether the Joint Stock Companies Arrangement Act, 1870, is binding in Victoria so that an arrangement under it is a bar to an action on a Victorian debt in a Victorian Court.

The facts are stated in their Lordships' judgment. A report of the proceedings in the Courts below will be found in 21 V. L. R. 22 and 22 V. L. R. 209.

Hodges J. decided that the plaintiff as a non-assenting creditor was not bound by the scheme of arrangement. He considered that assuming that the contract was made in Victoria and was to be performed in Victoria the law of Victoria must govern and that a discharge of a contract by the law of a place where the contract was not made, or to be performed, was not a discharge of such contract in the place where it was made or to be performed unless the law creating the discharge was the law of a legislature competent to and purporting to bind the Courts of the country in which the contract was made or to be performed and in which the action was brought. He did not question that the Imperial Parliament could legislate for the whole empire, Victoria included, or that the Imperial Parliament had so legislated in the case of the Bankruptcy Acts as far as concerned the operation of a discharge. After referring to the argument on behalf of the company that the English Companies Acts were legislation by the Imperial Parliament for the whole empire, and stating that such legislation would not apply to Victoria unless Victoria were expressly mentioned

or the statute shewed an intention on the part of the Imperial Parliament to legislate for Victoria, the learned judge referred to certain sections of the Companies Act of 1862, namely, ss. 80, 87 and 163, and drew the inference from those sections that the Imperial Parliament was not legislating for Victoria.

He pointed out that as regards s. 80, it provides that a company shall be deemed to be unable to pay its debts in the cases of unsatisfied executions in England, Ireland or Scotland, and he inferred from the fact that the Act contains no similar provision in the case of executions in Victoria, that the Imperial Parliament was not legislating for that Colony.

Further as regards ss. 87 and 163, he considered that they provide in effect that actions and suits shall not be allowed to proceed against a company after an order for winding-up except with the leave of the Court, and that executions put in force against a company after a winding-up shall be void. From these sections the judge also inferred that the Imperial Statute had no application to Victoria.

Madden C.J. at the trial gave the plaintiff a decree for the full amount claimed with costs.

The Full Court, in appeal from both orders, treated them as depending on the order of Hodges J. It stated that the main argument of the appellants was that the words "the creditors" in s. 2 of the Joint Stock Companies Arrangement Act, included all the creditors of an English company, and that as the Imperial Parliament had power to legislate for the Colonies, the arrangement was binding in Victoria on all Victorian creditors. It rejected such argument on the ground that the words "all creditors" would include creditors in foreign countries as well; that the Imperial Parliament could not bind creditors in foreign countries; that it was impossible to say that the same clause had a different import according as it applied to creditors in foreign countries or to creditors in the Colonies; and that if such had been the intention of the Imperial Parliament it would not have been expressed in a manner so ambiguous. It held that the Joint Stock Companies Arrangement Act, 1870, must be read in connection with the principal Act of 1862, which contains many provisions, especially

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those applicable to the registration and the winding-up of companies, which can have no application to the Colonies. It also relied upon ss. 87, 163.

It further maintained that if the opinions expressed by James and Mellish JJ. in the case of *In re Oriental Inland Steam Co.* (1) were right, namely, that the liquidator appointed by the English Court was a trustee for the general body of the creditors, there would be the difficulty that the Colonial Court would have no jurisdiction over him in the administration of the assets.

The judgment further insisted that there is no real analogy between the English Bankruptcy Acts a discharge under which has been held to be binding in the Colonies and the Companies Acts so far as they relate to winding-up.

Cohen, Q.C., Buckley, Q.C., and *Paine*, for the appellants, contended that the arrangement under the Imperial Act of 1870, sanctioned by Vaughan Williams J. on April 13, 1894, bound the plaintiff and was an answer to the action. That Act on its true construction applies to the Colonies, and is not limited to the United Kingdom. The Imperial Parliament intended arrangements or compromises thereunder when agreed to by a three-fourths statutory majority of the creditors of a company and sanctioned by an order of the Court to be binding on all creditors of the company everywhere, and therefore in the Colonies. Even if read with the Act of 1862, ss. 80, 87 and 163, it did not justify the inference that Parliament was not legislating for Victoria. It did not follow that because Parliament specified events in which a company shall be deemed unable to pay its debts it did not intend its legislation with regard to arrangements made in a winding-up to apply to the Colonies. Nor was it a reasonable inference that because it was left to the Colonial Legislature and Courts to make any necessary provisions for insuring equal distribution of assets in the Colonies, therefore the English Act of 1870 was not intended to apply in the Colonies. It was incorrect, too, to say that the Colonial Court would have no jurisdiction over a

(1) (1874) L. R. 9 Ch. 557.

liquidator appointed by an English Court. Such liquidator would have to apply to the Colonial Court for its aid, and by so doing would submit to its jurisdiction. Reference was made to the *Sussex Peerage Case* (1) as to the rules for the construction of Acts of Parliament. Again, the grounds on which it has been held that a discharge under the Imperial Bankruptcy Acts constitute a good defence to an action brought in the Colonial Courts to recover a Colonial debt apply to this case, and lead to the conclusion that the arrangement relied upon is binding upon all creditors, whether English or Victorian. Reference was made to *Ellis* v. *M'Henry* (2); *Edwards* v. *Ronald* (3); 6 Geo. 4, c. 16, ss. 121, 126; *Gill* v. *Barron* (4); *In re Oriental Inland Steam Co.* (5); *Knowles* v. *Scott* (6); *Bank of Hindustan* v. *Premchand Raichand* (7); *Callender, Sykes & Co.* v. *Colonial Secretary of Lagos.* (8) Reference was made to 28 & 29 Vict. c. 63, ss. 1, 2, to shew how far English Acts apply to the Colonies. Unless an English winding-up order or statutory arrangement is held to be a bar to colonial actions, the trust for equal distribution amongst the creditors, which is the object of either proceeding, is violated. It is equitable that the respondent should be bound thereby. She contracted with a company which was the creation of English municipal law, and is bound by the law of the country by which it was created. The debtor is governed by the statutes under which its existence is created and regulated, while the creditor contracted with a statutory persona, liable to be wound up by the law of its existence. Reference was made to *In re Oriental Bank Corporation* (9); *Sidaway* v. *Hay* (10); Westlake's International Law, p. 282, s. 242; *In re Matheson Brothers, Limited* (11); *In re Artola Hermanos* (12); *In re Commercial Bank of South Australia.* (13) A corporation is recognised in countries, other than the country

(1) (1844) 11 Cl. & F. 85.
(2) (1871) L. R. 6 C. P. 228, 234.
(3) (1830) 1 Knapp, P. C. 259.
(4) (1868) L. R. 2 P. C. 157.
(5) L. R. 9 Ch. 557.
(6) [1891] 1 Ch. 717.
(7) (1868) 5 Bomb. H. C. R., O. C. J. 83.
(8) [1891] A. C. 460.
(9) (1884) 10 Vict. L. R. E. 154.
(10) (1824) 3 B. & C. 22.
(11) (1884) 27 Ch. D. 225.
(12) (1890) 24 Q. B. D. 640.
(13) (1886) 33 Ch. D. 175.

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of its creation and domicile, for certain purposes: see Lindley, 5th ed. p. 909; *Bateman* v. *Service.* (1) Proceedings in the English Court are not for the purposes of this case proceedings in a foreign Court within the meaning of *Gibbs* v. *La Société des Métaux* (2): see also *Bartles* v. *Hodges* (3) cited therein, and *Phillips* v. *Adams* (4), *In re International Pulp and Paper Co.* (5)

Cozens-Hardy, Q.C., Upjohn, Q.C., and *Ryland*, for the respondent, contended that the question upon which the decision of the case turned was whether the Joint Stock Arrangement Act of 1870 applied in the Colonies. It was contended that that Act, the Act of 1862 and the cognate Acts of the British Legislature, do not extend to or bind the Court of the Colony of Victoria, which has a complete system of company legislation established there by local Acts. In the Act of 1862, s. 128 is the only one which purports to refer to the Colonies, while s. 122 deals with Scotland and Ireland, and omits to refer to the Colonies. So also the Acts of 1867 and 1870, which are incorporated with the Act of 1862, while the Act of 1883 deals expressly with the Colonies. The analogy of bankruptcy does not assist the appellant. The case of *Callender Sykes* v. *Colonial Secretary of Lagos* (6) shews why and to what extent effect is given to British bankruptcy legislation in the Colonies. But there is a broad distinction between the effect of bankruptcy and that of winding-up, both in its effect upon title and in reference to the applicability of the legislation relating to those subjects respectively. It was contended that a debt contracted and to be discharged within the Colony of Victoria cannot be discharged or affected by proceedings in England or elsewhere in any country which is foreign to the Colony. To effect that result would require either a Victorian Act or an Imperial Act which in terms extended to Victoria, binding the Courts therein. Otherwise the rights of the respondent under her contract with the company remained unaffected by any order or proceeding of the English Court. Reliance was placed on *Gibbs* v. *Société*

(1) (1881) 6 App. Cas. 386.
(2) 25 Q. B. D. 399.
(3) (1861) 1 B. & S. 375.
(4) (1828) 8 B. & C. 477.
(5) (1876) 3 Ch. D. 594.
(6) [1891] A. C. 460.

des Métaux (1). There is no principle of law on which it could be implied in this contract that a winding-up order in England would be a discharge, or that the rights of the creditor should be governed by the law of the country where the company was incorporated. Reference was made to s. 87 of the Act of 1870; and the case of *Ellis* v. *M'Henry* (2), and other cases cited by the appellant were referred to and distinguished.

Cohen, Q.C., replied.

The judgment of their Lordships was delivered by

LORD DAVEY. On January 23, 1893, the respondent in Victoria placed 3700*l.* on deposit with the New Zealand Loan and Mercantile Agency Company, Limited, the present appellants. This company was incorporated in England under the English Companies Acts with its head office in England, but carried on business in New Zealand and the Australian Colonies, including the Colony of Victoria. On July 12, 1893, a creditor's petition was presented to the Court in Victoria for winding up the appellant company. A provisional liquidator was appointed but no order was ever made on this petition and there has been no winding-up of the appellant company in Victoria. On the same July 12, 1893, the appellant company itself presented a petition to the High Court of Justice in England and on July 21, 1893, an order was made by that Court for the compulsory winding-up of the appellant company. Subsequently a scheme of arrangement was prepared and submitted to meetings of the creditors and contributories of the appellant company, and accepted by the requisite statutory majorities of creditors and contributories in compliance with the provisions of the English Joint Stock Companies Arrangement Act, 1870. By an Order of April 13, 1894, the High Court in England sanctioned the scheme of arrangement with immaterial amendments and declared the same to be binding on all the creditors and contributories of the company, and also on the official receiver and liquidator thereof. By this scheme it was provided that a new company should be formed with the same name to acquire the

(1) 25 Q. B. D. 399. (2) L. R. 6 C. P. 228.

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undertaking and property of the old company (i.e. the present appellants), and to assume and provide for its liabilities in manner thereinafter mentioned, and that the new company should pay to each unsecured creditor of the old company 12*l.* 10*s.* per cent. on the amount of his claim in cash with interest capitalised to June 30, 1894, and for the remaining 87*l.* 10*s.* per cent. should issue to such creditor debenture-stock. And it was further provided that forthwith after the scheme should have become finally binding on all parties each creditor of the old company should, subject to the carrying out of the scheme, hold his claim in trust for the new company, and release or deal with the same as the new company shall direct. The new company was formed and is carrying on business in Victoria, and has acquired or has title to all the property of the appellant company. The respondent had due notice of the scheme and of the meetings of creditors to consider the same.

On January 4, 1895, the respondent commenced an action in Victoria against the appellant company to recover her deposit of 3700*l.* and interest. By their defence the appellant company stated (paragraph 5) the winding-up petition in Victoria (paragraph 6) the winding-up order in England (paragraphs 7, 8 and 9) the proceedings under the Arrangement Act, 1870 (paragraphs 10 and 11), the material provisions of the scheme and (paragraph 13) submitted that the respondent was bound by the scheme as by a new contract, and further, that she had no longer any beneficial interest in or right to receive the money claimed by her. In her reply, the respondent objected that the Joint Stock Arrangement Act had no force or effect in the Colony of Victoria, and that the acceptance of the scheme by the three-fourths majority of creditors would not make it binding upon the respondent or be an answer to the action. There was a rejoinder and sur-rejoinder which it is not necessary for the present purpose to notice.

The points of law raised by the above-stated paragraphs of the defence and reply were set down for argument before trial, and by an order of Hodges J. of August 7, 1895, it was ordered and adjudged that those paragraphs of the defence afforded no answer to the respondent's claim. At the trial of the action

before the Chief Justice judgment was given for the respondent. Both orders were appealed to the Full Court, and by two orders of September 1, 1896, were affirmed. The present appeal is against these orders.

It was contended before their Lordships that the Arrangement Act, 1870, extended to all the Colonies as well as the United Kingdom, and that the Colonial Courts were therefore bound to take notice of the proceedings under that Act and give judicial effect to them. It was the intention of the Act (it was said) to bind all the creditors of the company, and the Act should be construed so as to give effect to that intention so far as possible, and as the Parliament of the United Kingdom can bind the Colonies, it must be assumed to have done so. The analogy of bankruptcy was referred to, and reliance was placed on a decision of the Court of Common Pleas in *Ellis* v. *M'Henry*. (1)

Their Lordships do not think that the Arrangement Act of 1870, when read by itself and detached from the other Companies Acts, does either by express words or by necessary implication extend to the Colonies. That Act, however, cannot be regarded by itself, but is only one of a collection of Acts together containing the statutory law relating to joint stock companies in the United Kingdom which are compendiously referred to as the Companies Acts, and ordered to be read together. It is impossible to contend that the Companies Acts as a whole extend to the Colonies or are intended to bind the Colonial Courts. The Colonies possess and have exercised the power of legislating on these subjects for themselves, and there is every reason why legislation of the United Kingdom should not unnecessarily be held to extend to the Colonies and thereby overrule, qualify, or add to their own legislation on the same subject.

It is quite true that the provisions of the Arrangement Act are expressed to extend to all creditors, and so they do, to foreign as well as Colonial creditors, but only when their rights are in question in the Courts of the United Kingdom. Their Lordships adopt what was said by Holroyd J. on this point:—

(1) L. R. 6 C. P. 228.

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"I am quite willing to admit, indeed I entertain no doubt, that the compromise spoken of in section two is one between a company and all its creditors or all of a particular class, that all are to be summoned to any meeting which the Court may order, and that the votes of all who attend either in person or by proxy are to be counted. 'All' means 'all,' wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domiciled, will be bound by the result. But we are asked to say, looking at this one section only, that the same clause has a different import according as it is applied to foreign countries or to the Colonies; that with respect to the former its operation is confined to the jurisdiction of the English Courts, while upon the latter it imposes a new law, and one in derogation of the legislative powers possessed by those Colonies which enjoy self-government. It seems hardly probable that, if such was the purpose of the Imperial Parliament, it should have been expressed in a manner so ambiguous."

Nor do their Lordships think that any assistance is to be derived from what has been held with regard to the application of the Bankruptcy Acts to the Colonies. It has been decided that by the express words of the Bankruptcy Acts all the property real and personal of an English bankrupt in the Colonies as well as in the United Kingdom is vested in his assignees or trustees. Their title must therefore receive recognition in the Colonial Courts, from which it has been considered to follow that the bankrupt, being denuded of his property by the English law, is also entitled to plead the discharge given him by the same law. But how does this assist the appellants? We have to deal with the winding up of a company not with bankruptcy, and there is a material distinction between the effect of bankruptcy and that of winding up. In the former case the whole property of the bankrupt is taken out of him, whilst in the latter case the property remains vested in title and in fact in the company, subject only to its being administered for the purposes of the winding up under the direction of the English Courts. Their Lordships are not called upon to criticise

the decision in *Ellis* v. *M'Henry* (1), which in their opinion does not apply to the present case.

If, as their Lordships hold, the Arrangement Act of 1870 does not extend to the Colonies, the proceedings in the English Court are for this purpose proceedings in a foreign Court, and cannot be pleaded in Victoria as a defence to an action by a Victorian creditor as was decided in England with reference to a French winding-up in *Gibbs* v. *Société des Métaux*. (2)

One other argument was used which should be noticed. It was said that everybody who deals with a corporation has notice of its origin and constitution, and contracts with it subject to all the incidents which according to the law of its constitution may affect its liability upon its contracts. This argument is specious, but when examined is found to beg the question or rather to be the same point over again. The incident of the constitution of this company which is relied on is that it may be discharged from its liabilities by the order of an English Court. But it should be added "so far as the jurisdiction of that Court extends" and that brings us back to the same point.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The appellants will pay the costs of it.

Solicitors for appellants: *Paines, Blyth & Huxtable.*
Solicitors for respondent: *Stanley, Woodhouse & Hedderwick.*

(1) L. R. 6 C. P. 228.

(2) 25 Q. B. D. 399.

[PRIVY COUNCIL.]

J. C.* 1897 Feb. 4, 5, 10. 1898 March 5.

ECCLES AND OTHERS . . . . . APPELLANTS;

AND

MILLS AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Covenant by Lessor—Construction as to whether it runs with the Reversion—Liability for Breach after Lessor's death—Liability of Lessor's general Estate—Rights of Specific Devisees of Reversion.

A lease under seal contained a covenant by the lessor to finish laying down 1000 acres, part of the land demised, in good English grass within a year. The deed contained a subsequent declaration "that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto":—

Held, that the covenant must be construed as qualified and controlled by the declaration. Accordingly, it did not run with the reversion; and, not being incident to the relation of landlord and tenant, liability for breach thereof properly fell to be borne by the general estate of the deceased lessor.

Even if, as held by the Court below, it was unqualified and ran with the reversion, it was not a charge thereon. As between the specific devisees of the reversion and the general estate, the latter should primarily bear a liability which in its nature is not incident to the relation of landlord and tenant, but was incurred preparatory thereto.

APPEAL from a judgment of the Court of Appeal (June 29, 1895) dismissing an appeal against so much of the judgments of the Supreme Court of New Zealand (Otago and Southlane District), dated August 2, 1894, and February 1, 1895, as related to certain lands in Otago known as the Meadowbank estate.

John Jones, the testator and lessor in the case, died on March 16, 1869, his will being dated December 20, 1868, and the lease in question September 2, 1868. The lease related to the Meadowbank estate.

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, and SIR RICHARD COUCH.

In 1892 a suit was brought by the trustees of the will against divers of the beneficiaries thereunder to obtain an interpretation of the will with a view (inter alia) to determine whether the interests of any of the beneficiaries had been prejudicially affected by the trustees having paid out of the general estate certain damages awarded against the testator for breach of covenant contained in the lease granted by him. The covenant, the breach, and the award are set out in their Lordships' judgment.

Some of the defendants counter-claimed a general administration of the testator's estate.

The judge having indicated that he was not satisfied that the amount of the award was properly chargeable to residue, liberty was given to the appellants, the "Eccles trustees," who were entitled absolutely under a voluntary settlement and conveyance to the Meadowbank estate, to attend further proceedings. They accordingly appeared and pleaded—(1.) That the said covenant was not a covenant running with the reversion of the Meadowbank estate; (2.) That whether it did so or not, the sum payable under the said award was properly payable out of the testator's general estate, and ought not to be borne by the Meadowbank property or the persons entitled thereto.

On August 2, 1894, Williams J. held that the amount awarded and expenses attending the same so paid by the trustees out of the residuary estate ought to be disallowed in their accounts of such estate, and that the same were a charge on the Meadowbank estate in the hands of the Eccles trustees, and ought to be raised and paid out of that estate, but that no claim was sustainable for the income of the sum so improperly paid out of the residuary estate, and, by an order of the same date, it was found as a fact that the said covenant by the testator for laying down the said 1000 acres in grass might have been performed between the day of the death of the testator in March, 1869, and September 1, 1869, and the Court declared the same accordingly.

It was also held that the right claimed was not barred by the Statute of Limitations.

The Court of Appeal affirmed this order.

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The material part of the Chief Justice's judgment is as follows :—

"It was contended by the appellants that though the trustees might be liable on the covenant as devisees in trust to pay debts as well as in their capacity as executors and personal representatives of the lessor, the damages recovered in respect of the breach of covenant ought not to fall on the beneficiaries under the will who take the reversion in the land leased, but should fall on the residue as a debt of the testator. The answer to that is that the beneficiaries must take the gift with its liability unless the donor has shewn an intention to the contrary, and that a general provision for the payment of the donor's debts, or a gift of the residue or other property subject to payment of his debts, does not shew such intention. In *Hawkins* v. *Hawkins* (1) there were specific bequests upon trusts for H. and her children after payment of a legacy and of the testator's debts and funeral expenses and a bequest of the residue to the plaintiff; amongst the residue was a leasehold house considerably out of repair. This leasehold being worthless, the plaintiff surrendered to the landlord, who would only accept a surrender on payment of rent for two and a half quarters from the testator's death and a sum for dilapidations. The residue as a whole was valuable; it was held that the plaintiff was not entitled to have the sums which he had paid to the landlord for dilapidations paid out of the specifically bequeathed property as debts of the testator. The circumstance that in the present case the residue is charged with the debts, and the reversion is specifically bequeathed, makes no difference: the principle is applicable as well in the present case as in *Hawkins* v. *Hawkins*. (1)"

Cozens-Hardy, Q.C., and *Butcher*, for the appellants, contended that the covenant, when construed with the subsequent declaration contained in the deed, did not run with the reversion. *Hawkins* v. *Hawkins* (1), relied on in the Court below, does not apply. That was the case of a covenant by a lessee, and the leasehold was included in the testator's residue; here it is a covenant by the lessor, the reversion

(1) (1880) 13 Ch. D. 470.

is specifically bequeathed, and the residue is charged with debts.

[Reference was made to *Churchwardens of St. Saviour's, Southwark* v. *Smith.* (1)]

[LORD DAVEY referred to *Bennett* v. *Herring.* (2)]

See further *Grescot* v. *Green* (3), *Morse* v. *Tucker* (4), *Bermingham* v. *Burke.* (5) The case of *Marshall* v. *Holloway* (6) was then referred to, and it was pointed out that that case conflicts with two others, in neither of which was it referred to, namely, *Hawkins* v. *Hawkins* (7) and *Mansel* v. *Morton.* (8) See further, *Fitzwilliams* v. *Kelly* (9) and *Hickling* v. *Boyer.* (10) As the covenant did not run with the reversion, the only remedy was against the executors of the lessor, and the damages were recoverable out of his residuary estate. Even if the Court below was right in holding that the covenant did run with the reversion, still it does not follow that the damages were payable by the specific devisees of the reversion in exoneration of the residuary estate. First, the covenant was broken by the lessor in his lifetime, and was rendered incapable of performance at or before his death. Second, the trust in the will to pay debts out of residuary estate was wide enough to include the liability in question. Third, the only effect of the covenant running with the reversion was to give an additional remedy to the lessee against the assignee of the reversion. The residuary estate remained primarily liable. Besides, the assignee is only liable for breaches committed while he is in possession. Reference was made to 32 Hen. 8, c. 34.

It cannot be contended that under the lease or afterwards any charge over Meadowbank was created so as to make it primarily chargeable with the damages. The liability was a personal one by the lessor, his executors and assigns; the executors as between themselves and the assigns being under all the circumstances, including the terms of the will, primarily liable.

(1) (1762) 3 Burr. 1271.
(2) (1857) 3 C. B. (N.S.) 370.
(3) (1700) 1 Salk. 198, 199.
(4) (1846) 5 Hare, 79.
(5) (1845) 2 J. & Lat. 699.
(6) (1832) 5 Sim. 196.
(7) 13 Ch. D. 470.
(8) (1883) 22 Ch. D. 769.
(9) (1852) 10 Hare, 266.
(10) (1851) 3 Mac. & G. 635, 643.

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Warrington, Q.C., and *E. Russell Roberts*, for the respondents, the trustees of the will, submitted that they were not personally liable for any of the payments made by them out of residue in satisfaction of the award. In the event of their being charged therewith, it was contended that they ought to be recouped out of the Meadowbank estate.

Sargant, for the respondents, beneficiaries under the will and interested in the residue, contended that the covenant ran with the reversion and was to be performed by and enforceable against the assignees of the reversion. [He referred to *Spencer's Case* (1) and cases there cited, particularly to *Easterby* v. *Sampson*. (2)] *Churchwardens of St. Saviour's, Southwark* v. *Smith* (3) and *Grescot* v. *Green* (4) are distinguishable; for in them the time had elapsed for the performance of the covenant before assignment, while here the covenant was running when the testator died, and on the facts of the case might have been performed after the death of the testator. Even if it were not possible of performance after that date, still the testator had not in terms repudiated it, but had merely been quiescent, so that the lessee was not entitled to sue as for breach before the time had elapsed for its performance. *Johnstone* v. *Milling* (5) did not apply. Consequently the damages ultimately recovered were, at the time of the death, not a debt, but a contingent liability attached to the Meadowbank estate. Such liability cannot be said to have been a debt within the meaning of the testator's will. It was a charge on the Meadowbank estate, and the devisees thereof were bound to take the property devised to them cum onere. The cases relating to a bequest of shares with liability to calls dealing with the question whether the executors are exclusively liable to answer the same, or whether they must be met by the specific legatees, are analogous to this; and so are such cases as *Hawkins* v. *Hawkins* (6) and *Mansel* v. *Morton*. (7) With regard to *Marshall* v. *Holloway* (8) it was explained in *Arm-*

(1) (1583) Sm. L. C. 9th ed. vol. i. p. 72.
(2) (1830) 6 Bing. 644.
(3) 3 Burr. 1271.
(4) 1 Salk. 198.
(5) (1886) 16 Q. B. D. 460.
(6) 13 Ch. D. 470.
(7) 22 Ch. D. 769.
(8) 5 Sim. 196.

strong v. *Burnett* (1), which latter case was approved in *Day* v. *Day* (2) by Kindersley V.-C. The other cases cited by the appellant were referred to and distinguished.

Cozens-Hardy, *Q.C.*, replied, citing *Hochster* v. *De la Tour*. (3)

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The judgment of their Lordships was delivered by

1898 *March* 5.

LORD MACNAGHTEN. The question in this case was whether a sum of money recovered more than twenty years ago by the lessee of a New Zealand farm from the executors of his lessor as compensation for the non-fulfilment of a certain covenant in the lease ought not to have been charged against the specific devisees of the farm instead of being paid, as it was, out of the lessor's general estate.

The claim though it arose so long ago is not barred by statute, or by laches, or by any rule of equity. The liability is not dealt with directly by any provision in the lessor's will. The answer to the question must, therefore, depend on the true meaning and nature of the covenant. Is the covenant one that runs with the reversion? If so, is that circumstance of itself enough to throw the liability on the reversion in exoneration of the general estate? If the covenant does not run with the reversion, does the reversioner necessarily escape all liability? or must the inquiry be carried further? May not the liability depend on other considerations than the rights and remedies of lessees under the statute of 32 Hen. 8, and the question whether the agreement is or is not under seal? May it not perhaps be that as between the objects of the testator's bounty the liability depends on the consideration whether the covenant is properly incident to the relation of landlord and tenant, or is in its nature preliminary and introductory to the commencement of that relation—whether it is, so to speak, a condition of the letting or a condition of the lease? These questions were all debated more or less fully at the bar. They are certainly none of them free from difficulty, and there does not appear to

(1) (1855) 20 Beav. 424, 437. (2) (1860) 1 Dr. & Sm. 260.
(3) (1853) 2 E. & B. 678.

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be any authority applicable to the peculiar circumstances of the case.

By deed dated September 2, 1868, the lessor John Jones, of Dunedin, in the province of Otago, demised to Francis Dillon Bell a farm of some 4000 acres in that province known as Meadowbank. The term was fourteen years from September 1, 1868. The rent was to be 1000*l.* a year. The lease contained a covenant by the lessor for himself, his heirs, executors, administrators and assigns in the following words:—

"The lessor, his heirs or assigns will, at his or their own expense, on or before 1st day of September, 1869, completely finish laying down in good English grass and in accordance with the rules of good husbandry the 1000 acres which the lessor has already commenced laying down in English grass."

If there were nothing more in the lease bearing on the construction of this covenant and nothing else to be considered, there would undoubtedly be implied in and by reason of the covenant to "finish" the operation in question an agreement on the part of the lessor to lay down in English grass and according to the rules of good husbandry so much and such parts of the 1000 acres referred to as had not been laid down in that manner already. There would also be implied on the part of the lessee an authority or licence for the lessor to enter upon the land and cultivate it for that purpose. And if such an agreement and such a provision were implied in the lease, it would be difficult to contend that the burthen of the covenant did not run with the reversion so as to give the lessee a right of action and a remedy against the persons who might be assignees of the reversion at the time fixed for the complete fulfilment of the covenant.

The covenant, however, does not stand alone. It is accompanied and apparently controlled by the following declaration, which is inserted at the end of the lease:—

"It is hereby declared that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto."

The effect of this declaration, if it means what it says, is to qualify the preceding covenant by shutting out every possible implication which the terms of the covenant would seem to suggest or require.

The result, therefore, is that by the covenant so qualified the lessor warrants that he will on or before September, 1869, completely finish laying down the 1000 acres in good English grass according to the rules of good husbandry, but that he does not bind himself further in any shape or way. He does not agree to break up the land, or to lay it down, or to do anything on the land in fulfilment of the apparent intention of the covenant. He has reserved no power of entry, nor is he given any authority to enter for that purpose. Still, if the operation is not found finished on the prescribed day, he must be answerable in damages. That is the bargain between the parties. They stand to be bound by the strict letter of their contract. They chose to draw the line there. They would not go one step further. Whatever there might be beyond the mere letter of the contract depending on inference or implication, that was deliberately excluded—a singular provision, no doubt, whether it proceeded from mutual distrust, or sprang from the fancy of the draftsman, or was adopted as a means of avoiding some difficulty of the moment. But the declaration is not open to any ambiguity. The language is as plain and as positive as language can be. And, after all, perhaps the explanation is not so very far to seek if Mr. Bell's letter of July 2, 1869, which is in evidence, may be taken as an accurate description of the surrounding circumstances and the position of the parties at the time when the lease was executed.

The treaty for the lease was, it seems, a very protracted affair. The great matter to be arranged was the laying down of the 1000 acres in English grass. Mr. Bell counted upon this improvement to make the rent. At Mr. Jones' request he laid down about 250 acres. Mr. Jones set about doing the rest of the work himself. He ploughed the ground and he sowed it. Then he wanted Mr. Bell to accept the land as he was laying it down. Mr. Bell refused. The quality of the seed was not what it should have been; the best seed in the world would

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come to nothing on a single ploughing: the work would have to be done all over again. Everybody said so—friends and neighbours, as well as the incoming tenant. Heedless of warning and deaf to advice, Mr. Jones went on in his own way. When he had once ploughed and once sown the specified number of acres, though no grass was to be seen, he maintained that he had done all that was required. Mr. Bell would not yield. Mr. Jones was firm, or perhaps obstinate. Fortunately they both appealed to the future. Time would tell who was right and who was wrong. So when it came to the point of granting the lease "a year was given," as Mr. Bell says, "to *prove*" whether the work had been properly done or not. Mr. Jones was content to pay the penalty if the fates were against him. But, apparently as a point of honour, he would not set his hand to anything implying an agreement to do more than he had done without expressly negativing any such implication.

Whether this explanation be satisfactory or not, everybody must admit that in construing a contract the Court is bound to give effect to every part of it. If a stipulation is found in the bond it matters little how it got there. It is not to be rejected because it may be unusual, or ignored because twenty years afterwards the Court cannot guess why it was ever introduced.

Mr. Jones did not live to see the end of his experiment. He died on March 16, 1869. By his will, which was made on December 20, 1868, he divided his property among his children. Some of their shares he settled, including the share in which Meadowbank was comprised. He appointed executors, and made them also trustees of the settled shares.

The appellants, who claim under a voluntary conveyance, represent the inheritance in Meadowbank. The principal respondents are the persons interested in the testator's residuary estate.

At the end of the first year of his tenancy Mr. Bell claimed compensation for breach of the covenant in question. The claim was originally made against the testator's executors as trustees of Meadowbank. The matter was referred to arbi-

tration. By an award dated March 2, 1871, the arbitrators found that the covenant had been broken. They assessed the damages at 2296*l.* 7*s.* 4*d.*, and directed that the parties contesting the claim should pay that sum to Mr. Bell as executors of Mr. Jones. The money with interest and costs was ultimately paid to Mr. Bell out of the testator's personal estate not specifically bequeathed.

The payment was directed to be borne by the testator's executors, in deference to an opinion of Sir Roundell Palmer and Mr. T. D. Archibald, afterwards Archibald J., who advised that the covenant did not run with the reversion, and that the damages would be payable out of the testator's general estate.

The learned counsel, of course, gave no reasons with their opinion. But it can hardly be doubted that they proceeded on the principle that effect ought to be given to every term of the contract.

The propriety of the payment was not questioned at the time or for many years afterwards. Lately, however, difficulties arose in regard to some items in the trustees' accounts, and two suits were instituted for partial administration of the testator's estate. In the course of the second suit the question now at issue came to be discussed. At the suggestion of the judge the pleadings were amended. All parties interested were brought before the Court, and the suit was turned into a suit for general administration. Williams J. was of opinion that Mr. Bell's claim ought to have been satisfied by the specific devisees, and that the testator's general estate ought to be recouped by a charge on Meadowbank. A decree to that effect was accordingly pronounced, with consequential directions. On appeal the Court unanimously affirmed the decree.

Their Lordships are unable to concur in the view taken by Williams J. and the Court of Appeal in New Zealand. They think that the covenant in question must be construed as qualified and controlled by the declaration which follows it. On that construction the covenant does not run with the reversion; and inasmuch as in their opinion the covenant is not incident to the relation of landlord and tenant, they think that

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the liability for the breach of the covenant properly fell to be borne by the testator's general estate.

The view taken by their Lordships of the nature and meaning of the covenant renders it unnecessary to determine upon whom, as between the different objects of the testator's bounty, the liability would have fallen primarily, if the covenant had been unqualified and uncontrolled by any other provision in the lease. But, inasmuch as Williams J. proceeded on the assumption that the covenant was unqualified, and on the admission of counsel that the covenant ran with the reversion, and as his judgment in its entirety was approved by the Court of Appeal, it would hardly be right for this Board to pass the question by in silence.

The reasoning of Williams J. in substance seems to be this: The covenant runs with the reversion. It is therefore not merely an obligation imposed by statute on the reversioner, but a burthen or charge upon the reversion itself. A person who takes a benefit under a will must take the benefit with any burthen that happens to be attached to it. Then there are plenty of cases where legatees of leaseholds have tried in vain to shift the burthens incident to their leasehold interest and throw them on the testator's general estate; those cases are in point: there the burthen was incident to the lease; here it is incident to the reversion. The leaseholder bears the burthen incident to his holding; the reversioner must in like manner bear the burthen incidental to his estate.

This reasoning does not appear to their Lordships altogether satisfactory. It does not perhaps keep sufficiently distinct the two principal questions which, on the assumption that the covenant runs with the reversion, would present themselves for consideration—the question whether the covenant is a burthen or charge on the reversion itself, and the question whether the covenant is in its nature incident to the relation of landlord and tenant. In regard to both, their Lordships have some difficulty in accepting the view of the learned judge. Granted that the covenant runs with the reversion, it does not follow that the liability under the covenant is a burthen upon the reversion. At common law no

covenant ran with the reversion. By the statute of Henry VIII. all lessees have "like action and remedy against all persons . . . . having any gift or grant . . . . of the reversion of the said lands and hereditaments so letten . . . . for any condition or covenant expressed in the indentures of their leases" as they might have had against their lessors. They cannot have any greater right or any more extended remedy. In the lifetime of the lessor the covenant was not a burthen on the land in the hands of the lessor. After his death, how can it be a burthen on the land in the hands of the specific devisee? The appellants do not dispute that, if the covenant ran with the reversion, the specific devisees of Meadowbank came under liability to Mr. Bell. Whatever liability the statute threw on the specific devisees as assignees of the reversion, that they were bound to bear as between themselves and the lessee. But the testator's estate was also liable, and residuary legatees take nothing until the testator's liabilities are satisfied. If the liability for the breach of the covenant was not a charge on the inheritance, as Williams J. seems to have thought it was, why should the specific devisees bear it rather than the testator's estate, merely because for the protection of tenants the statute gives the lessee an additional remedy against the lessor's assignees? The inquiry must go deeper. It would seem that the nature of the obligation in each particular case must determine the question. If it is in its nature incident to the relation of landlord and tenant, it would only be fair that the burthen should be borne by the devisee as between him and the testator's estate, falling on him as landlord, whether the agreement bears a seal or not. That seems to have been the principle of *Mansel* v. *Morton* (1), where it will be observed there was no covenant to run with the reversion, though by some slip in the report the Master of the Rolls is made to say that there was. The lease was not under seal, and therefore the statute had no application. The agreement there was that the lessor should buy the tenant's property at the end of the term; and it was held that as between the specific devisee and the testator's estate this obligation, incident as it plainly was

(1) 22 Ch. D. 769.

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to the relation of landlord and tenant, fell on the devisee. On the other hand, if the covenant is not in its nature incident to the relation of landlord and tenant—if the thing to be done is something preparatory to the complete establishment of that relation, it would seem to be fair and in accordance with the probable wishes of the testator that the burthen of the covenant unperformed by him in his lifetime, should be borne by his estate rather than by the specific devisees. In the present case the object of the covenant was to ensure the premises being put into a condition fit for the occupation of the tenant under the lease. Such a covenant is intended to be performed forthwith, not to remain attendant on the lease during its currency. In its nature it seems to be very different from a covenant by the landlord to keep buildings on the demised land in repair, or to pay for unexhausted improvements at the end of the lease.

The cases cited at the bar, where the question was between a specific legatee of leaseholds and the testator's estate, are of little or no assistance in determining the question now under consideration. The only one cited in which the covenant could possibly be regarded as otherwise than incident to the relation of landlord and tenant (if indeed any covenant in a lease on the part of the lessee can be regarded as otherwise than incident to that relation) was the case of *Marshall* v. *Holloway* (1), before Shadwell V.-C. There the lessee covenanted to make certain improvements in existing buildings, and to erect certain new buildings on the demised land within a comparatively short period. The lessee died before the period expired without having completely performed his covenant. It was held that the devisee of the leasehold ought to be exonerated by the general personal estate from the cost of completing the unfinished work. That case, if it could be accepted as an authority, would appear to go far beyond the position which the appellants seek to establish. The report, however, is so confused that it is not easy to say upon which, if any, of the various grounds touched upon in the judgment his Honour desired to rest his decision. It is certainly not

(1) 5 Sim. 196.

surprising to find that subsequent judges have differed on the point. Turner V.-C. felt considerably embarrassed by *Marshall* v. *Holloway* (1) in a case before him (*Fitzwilliams* v. *Kelly* (2)), where the covenant was meant to be in attendance during the whole term of the lease, and to have a recurring operation—a case in this respect apparently as different from *Marshall* v. *Holloway* (1) as well could be. He thought Shadwell V.-C. must have relied on a provision in the will as to the payment of the testator's debts. Sir John Romilly M.R., however, considered that the principle in *Marshall* v. *Holloway* (1) and the principle in *Fitzwilliams* v. *Kelly* (2) were one and the same—the principle being that the obligation of completing the testator's interest in the subject-matter of the bequest falls on the testator's general estate: see *Armstrong* v. *Burnet*. (3) The Master of the Rolls seems to have thought that the fulfilment of the repairing and building covenant in *Marshall* v. *Holloway* (1) was required to complete the testator's interest as lessee, or, in other words, that the fulfilment of that covenant might be regarded as antecedent and preparatory to the complete establishment of the relation of tenant and landlord. Whatever may be the true explanation of *Marshall* v. *Holloway* (1), their Lordships agree with Williams J. in thinking that it would not be satisfactory to rely on a case about which there is so much obscurity, though they cannot see that *Marshall* v. *Holloway* (1) was virtually overruled, or indeed affected by, the decision of the Court of Appeal in *Hawkins* v. *Hawkins* (4), which seems to have been a very plain case, and is one in which their Lordships entirely agree.

Their Lordships will humbly advise Her Majesty that the decision under appeal should be reversed, and that the suit should be dismissed with costs in the Courts below so far as it seeks to throw the liability for the breach of the covenant in question on the specific devisees of Meadowbank. The respondents who represent the residuary legatees will pay the

(1) 5 Sim. 196.
(2) 10 Hare, 266.
(3) 20 Beav. 424, 431, 437.
(4) 13 Ch. D. 470.

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costs of the appeal, including the costs of the respondents, the trustees. The last-named costs will be taxed as between solicitor and client.

Solicitors for appellants: *Pollock & Co.*

Solicitors for respondent trustees: *Blyth, Dutton, Hartley & Blyth.*

Solicitors for respondent beneficiaries: *Paines, Blyth & Huxtable.*

[HOUSE OF LORDS.]

THE LONDON STREET TRAMWAYS COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE LONDON COUNTY COUNCIL . . RESPONDENTS.

H. L. (E.) 1898 April 25.

House of Lords' Decision—Res Judicata—Tramways, Compulsory Purchase of —Tramways Act 1870 *c.* 78 *s.* 43.

A decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent cases. An erroneous decision can be set right only by an Act of Parliament.

THE London County Council having required the London Street Tramways Company, Limited, to sell to them certain further portions of their tramways under the Tramways Act 1870, the company claimed to be paid for their tramway undertaking not the mere cost of construction less depreciation but the value as a going and profit-earning concern, and tendered before Sir F. Bramwell, the referee appointed by the Board of Trade, evidence shewing that at the time of the notice to sell there were present or existing profits of the company. Sir F. Bramwell rejected the evidence and made his award for 22,872*l.* on the basis that the Act did not allow him to adopt a method of valuation based upon profits.

The company having applied to the Queen's Bench Division to set aside the award or remit it to the referee for further consideration, the application was refused and this decision was affirmed by the Court of Appeal, following *Edinburgh Street Tramways Co.* v. *Lord Provost, &c., of Edinburgh* and *London Street Tramways Co.* v. *London County Council* (1), heard together in 1894. The company brought the present appeal. The only question argued was as to the power of the House to reconsider previous decisions of its own and, if it thought the decisions wrong, to overrule or depart from them in subsequent cases. The facts of the present case were not discussed or

(1) [1894] A. C. 456, 489.

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even stated in argument and no distinction between this and the former cases was relied on.

Sir R. T. Reid Q.C. and *Seward Brice Q.C.* (*J. R. Paget* with them) for the appellants. This is in substance a petition to reconsider and overrule the decisions of this House in the *Edinburgh Street Tramways* and the *London Street Tramways* cases (1) upon the construction of s. 43 of the Tramways Act, 1870. There are certain differences, between the present facts and the facts in those cases, which are set out in the appellants' case, but they are comparatively unimportant. The question is the same and arises upon the construction of the same statute. It is therefore desired to argue as a preliminary point the general question whether the House is bound by its own decision on a point of law in a previous case, and if that is determined in the appellants' favour, then to argue that the above decisions in 1894 were erroneous, for reasons which were not presented to the House in those cases. Upon the general question there is a conflict of authority. In *Perry* v. *Whitehead* (2) Lord Eldon said: "A rule of law laid down by the House of Lords cannot be reversed by the Chancellor . . . . The rule of law must remain, till altered by the House of Lords," plainly implying that the House had the power; and see *Stewart* v. *Agnew* (3), where the House amended its judgment as to a point on which no decision had been given by the Court of Session, and on which no argument had, through misapprehension, been stated in the House by the party against whom the judgment had been pronounced.

But in *Fletcher* v. *Lord Sondes* (4) Lord Eldon used expressions to the contrary effect. In *Bright* v. *Hutton* (5) Lord St. Leonards stated his opinion that "although you are bound by your own decisions as much as any Court would be bound, so that you could not reverse your own decision in a particular case, yet you are not bound by a rule of law which you may lay down, if upon a subsequent occasion you should find reason

(1) [1894] A. C. 456, 489.
(2) (1801) 6 Ves. 544, 547, 548.
(3) (1823) 1 Shaw App. 413.
(4) (1827) 1 Bli. (N.S.) 144, 249.
(5) (1852) 3 H. L. C. 341, 388, 391.

to differ from that rule; that is, this House, like every court of justice, possesses an inherent power to correct an error into which it may have fallen." Lord Campbell said: "According to the impression upon my mind, a decision of this High Court, in point of law, is conclusive upon the House itself, as well as upon all inferior tribunals. I consider it the constitutional mode in which the law is declared, and that after such a judgment has been pronounced, it can only be altered by an Act of the Legislature," with more to the same effect. In *Tommey* v. *White* (1) it was held that the House could not rehear a case and correct an error without an Act of Parliament, but that does not touch the present point, which is whether it can in a subsequent case overrule or depart from its prior decision. In *Wilson* v. *Wilson* (2) Lord St. Leonards drew this distinction and adhered to his former opinion as to applying the law in subsequent cases. And Lord Brougham said it "is a quæstio vexata, how far we may or may not disregard any one of our own judgments, when applied to another cause." In *Scott* v. *Maxwell* (3) Lord St. Leonards quoted Lord Loughborough as agreeing that if the House went wrong in point of law, though it could not reverse its decision, yet it was not bound to persevere in error.

[EARL OF HALSBURY L.C.: Lord Campbell in his life of Lord Brougham, Lives of the Lord Chancellors, vol. viii. pp. 400–402, refers to a mistake made by Lord Wynford on pronouncing a judgment of the House, and a bill brought in by Lord Brougham to reverse the judgment and afterwards withdrawn.]

In *Attorney-General* v. *Dean and Canons of Windsor* (4) Lord Campbell adhered to his former opinion as to the general rule, and Lord Kingsdown doubted, or at all events reserved his judgment. In *Beamish* v. *Beamish* (5) Lord Campbell, though disapproving of the decision in *Reg.* v. *Millis* (6) (where the Lords were equally divided and the judgment was only pronounced

(1) (1850) 3 H. L. C. 69.
(2) (1854) 5 H. L. C. 57, 63.
(3) (1854) 1 Macq. 791.
(4) (1860) 8 H. L. C. 369, 381, 391, 459.
(5) (1861) 9 H. L. C. 274, 338, 344, 349, 353.
(6) (1844) 10 Cl. & F. 534.

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upon the technical rule of the House that where the numbers are equal semper præsumitur pro negante), held that the House was bound by the decision. Lords Cranworth, Wensleydale and Chelmsford concurred. In *Mersey Docks Trustees* v. *Gibbs* (1) Lord Wensleydale took the same view, and in *Houldsworth* v. *City of Glasgow Bank* (2) Lord Blackburn expressed the same opinion. In *Ridsdale* v. *Clifton* (3) Lord Cairns in delivering the decision of the Privy Council discussed the question of the decisions of final courts of appeal—not only the Privy Council but all courts of appeal—being conclusive in subsequent cases against third parties. And he came to the conclusion that if their Lordships should dissent from a previous decision of the Privy Council they were at liberty to decide upon their own view of the law. This view was concurred in by Lord Watson in delivering the decision of the Privy Council in *Tooth* v. *Power*. (4) No doubt the decision of the Privy Council is the advice of a Board to the Sovereign, while the decision of this House is a judgment, but the principle which must guide both tribunals is the same, and the House, like every other tribunal, sits as the delegate of the Sovereign. The authorities above cited—though there is no actual decision—shew that this House can on a point of law disregard and depart from its own decision if erroneous. The interpretation of a statute is an a fortiori instance, for the statute may be conceived as repealing by anticipation an erroneous construction. It is manifest that the House might reverse its own decision if given in ignorance or forgetfulness of a statute having been enacted or repealed.

[They also referred to *Caledonian Ry. Co.* v. *Walker's Trustees* (5), per Lord Selborne; *Hadfield's Case* (6), per Bovill C.J., Brett and Grove JJ.; *Lord Advocate* v. *Young* (7); Lindley on Companies, 5th ed. p. 764.]

Freeman Q.C. and Hon. *Alfred Lyttelton* for the respondents were not heard.

(1) (1866) L. R. 1 H. L. 93, 123, 125.
(2) (1880) 5 App. Cas. 317, 335.
(3) (1877) 2 P. D. 276, 306, 307.
(4) [1891] A. C. 284, 292.
(5) (1882) 7 App. Cas. 259.
(6) (1873) L. R. 8 C. P. 306, 311, 313, 318.
(7) (1898) 62 J. P. 199.

EARL OF HALSBURY L.C. My Lords, I think your Lordships are very much indebted to Sir Robert Reid and his learned junior for the candour with which this question has been raised. It would undoubtedly have been extremely inconvenient if, after hearing the case argued for a considerable time, the fact had been pointed out to us that there was a decision of this House which was conclusive upon the point. By the candour of the learned counsel who very properly raised the question in the first instance, it has now been admitted that there is upon this very question a decision of this House.

My Lords, for my own part I am prepared to say that I adhere in terms to what has been said by Lord Campbell and assented to by Lord Wensleydale, Lord Cranworth, Lord Chelmsford and others, that a decision of this House once given upon a point of law is conclusive upon this House afterwards, and that it is impossible to raise that question again as if it was res integra and could be reargued, and so the House be asked to reverse its own decision. That is a principle which has been, I believe, without any real decision to the contrary, established now for some centuries, and I am therefore of opinion that in this case it is not competent for us to rehear and for counsel to reargue a question which has been recently decided.

My Lords, the only trace of authority for the proposition submitted to us by the learned counsel is that of Lord St. Leonards, and I give full effect to the argument of the learned counsel when I say that no doubt Lord St. Leonards did in the most unqualified manner lay down the proposition for which he contends. Whether that noble and learned Lord was altogether satisfied with his own reasoning I am not prepared to say. When I find the proposition coupled with such qualifications and such a preamble as Lord St. Leonards has introduced in his judgment, I entertain some doubt whether the noble and learned Lord was perfectly satisfied in his own mind as to the logic of his reasoning. Whether he was or was not, the main point is that this House has on more than one occasion acted upon the principle to which I have referred.

My Lords, no more conspicuous case could arise, I think,

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than what occurred in the case of *Beamish* v. *Beamish*. (1) In that case some of the learned Lords were of opinion that *Reg.* v. *Millis* (2) was wrongly decided, but nevertheless they acquiesced in that decision—that is to say, they held themselves bound by that decision in the subsequent case of *Beamish* v. *Beamish* (1), and treated that decision of your Lordships' House as conclusive upon the question then under appeal.

My Lords, it is totally impossible, as it appears to me, to disregard the whole current of authority upon this subject, and to suppose that what some people call an "extraordinary case," an "unusual case," a case somewhat different from the common, in the opinion of each litigant in turn, is sufficient to justify the rehearing and rearguing before the final Court of Appeal of a question which has been already decided. Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice as compared with the inconvenience—the disastrous inconvenience—of having each question subject to being reargued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final Court of Appeal? My Lords, "interest rei publicæ" that there should be "finis litium" at some time, and there could be no "finis litium" if it were possible to suggest in each case that it might be reargued, because it is "not an ordinary case," whatever that may mean. Under these circumstances I am of opinion that we ought not to allow this question to be reargued.

My Lords, I only wish to say one word in answer to a very ingenious argument which the learned counsel set before your Lordships. It is said that this House might have omitted to notice an Act of Parliament, or might have acted upon an Act of Parliament which was afterwards found to have been repealed. It seems to me that the answer to that ingenious suggestion is a very manifest one—namely, that that would be a case of a mistake of fact. If the House were under the

(1) 9 H. L. C. 274, 338, 344, 349, 353. (2) 10 Cl. & F. 534.

impression that there was an Act when there was not such an Act as was suggested, of course they would not be bound, when the fact was ascertained that there was not such an Act or that the Act had been repealed, to proceed upon the hypothesis that the Act existed. They would then have ascertained whether it existed or not as a matter of fact, and in a subsequent case they would act upon the law as they then found it to be, although before they had been under the impression, on the hypothesis I have put, either on the one hand that an Act of Parliament did not exist, or on the other hand that an Act had not been repealed (either case might be taken as an example) and acted accordingly. But what relation has that proposition to the question whether the same question of law can be reargued on the ground that it was not argued or not sufficiently argued, or that the decision of law upon the argument was wrong? It has no application at all.

Under these circumstances it appears to me that your Lordships would do well to act upon that which has been universally assumed in the profession, so far as I know, to be the principle, namely, that a decision of this House upon a question of law is conclusive, and that nothing but an Act of Parliament can set right that which is alleged to be wrong in a judgment of this House. For these reasons, my Lords, I move your Lordships that this appeal be dismissed with costs.

LORDS MACNAGHTEN, MORRIS, and JAMES OF HEREFORD concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, April 25, 1898.

Solicitors for appellants: *Murray, Hutchins, Stirling & Murray.*

Solicitor for respondents: *W. A. Blaxland.*

[HOUSE OF LORDS.]

H. L. (E.) 1898 April 28.

TATHAM, BROMAGE & CO. . . . . APPELLANTS;

AND

BURR . . . . . RESPONDENT.

THE "ENGINEER."

Admiralty—Ship—Marine Insurance—Collision Clause—Construction of Proviso "that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers."

A collision clause in a policy of marine insurance, covering damages payable in respect of a collision with another vessel, contained a proviso "that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers." The insured vessel came into collision with another vessel, which sank and was removed as an obstruction by commissioners under statutory powers. Both vessels were to blame for the collision. The owners of the insured vessel paid as damages to the owners of the sunken vessel a moiety of the sum which the latter had paid to the commissioners for the expenses of the removal, and made a claim upon the underwriters in respect of the moiety:—

Held, that the proviso must be construed as a business document prepared by men of business for their own use, and as business men would understand it: that it was not confined to payments made directly by the assured to the persons who caused the obstruction to be removed, but included indirect payments such as the moiety in question, and that the underwriters were not liable.

The North Britain, [1894] P. 77, approved.

THE following were the material parts of an agreed statement of facts in an action brought in the Queen's Bench Division by the appellants against the respondent, and tried without a jury by Bruce J.:—

In June 1895 the appellants, as owners of the steamship *Engineer*, effected with the respondent (inter alios) a policy of insurance subscribed by the respondent in the sum of 100*l.* on the hull and machinery of the steamship *Engineer*, valued at 8500*l.*, for twelve months.

Attached to the policy were clauses, known as Institute Clauses, the material one being as follows :—

"And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel and the assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any such collision the value of the ship hereby insured, we the assurers will severally pay the assured such proportion of three-fourths of such sum or sums so paid as our respective subscriptions hereto bear to the value of the ship hereby insured, and in cases in which the liability of the ship has been contested or proceedings have been taken to limit liability with the consent in writing of two-thirds of the subscribers to this policy in amount we will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur or be compelled to pay; but when both vessels are to blame then, unless the liability of the owners of one or both of such vessels shall become limited by law, claims under this clause shall be settled on the principle of cross liabilities, as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision."

Then followed this proviso in italics: "Provided always that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharfs, piers, stages and similar structures consequent on such collision, or in respect of the cargo or engagements of the insured vessel or for loss of life or personal injury."

In April 1896 whilst the policy was in force the steamship *Engineer* came into collision with the steamship *Harraton* near the entrance to the River Tees, and by reason of the collision the *Engineer* was considerably damaged and the *Harraton* sank and became a constructive total loss.

The place at which the *Harraton* sank was within the limits

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of the jurisdiction of the Tees Conservancy Commissioners, who thereupon under their statutory powers took the necessary steps to remove the obstruction caused by the wreck of the *Harraton*. The expenses incurred by the commissioners amounted to 1346*l*. An action was begun in the Admiralty Division by the owners of the *Harraton* against the owners of the *Engineer* and a counter-claim was entered on behalf of the appellants, but by agreement between the parties in that action both ships were deemed to have been in fault, and the damages suffered by both parties to the suit respectively as assessed by the registrar of the Admiralty Division assisted by merchants were duly paid by each to the other. The appellants as owners of the *Engineer* properly paid to the owners of the *Harraton* under the agreement 673*l*., being a moiety of the 1346*l*., for removing the obstruction caused by the wreck as being a loss or damage sustained by the owners of the *Harraton* incidental to and arising out of the collision, and thereafter the appellants sought to recover that moiety from their underwriters (including the respondent), but they declined to pay any part thereof, alleging that they were expressly excepted from liability in respect of that sum by the terms of the proviso.

The question for the determination of the Court was whether the respondent was liable under the policy to pay to the appellants such proportion of three-fourths of the sum of 673*l*. as the respondent's subscription bore to the value of the ship.

It being admitted that the case was undistinguishable from *The North Britain* (1), Bruce J., following that decision, held that the respondent was not liable, and this decision was affirmed by the Court of Appeal (Lord Esher M.R., A. L. Smith and Rigby L.JJ.).

The plaintiffs brought the present appeal.

Cohen Q.C. and *Carver Q.C.* for the appellants. The question turns on the proviso in the collision clause of the policy. Collision clauses in this form were introduced into policies in consequence of the decision in *London Steamship*

(1) [1894] P. 77.

Owners' Insurance Co. v. *Grampian Steamship Co.* (1) that where there is a collision between two vessels, by which one of them is more damaged than the other, and both being to blame they have to share the damage equally, there is not a cross liability on the part of each vessel to pay half of the damage sustained by the other, but one liability only, namely, the liability of the vessel less damaged to pay to the vessel more damaged one half of the amount by which the damage to the one exceeds the damage to the other, and that in such a case the owner of the more damaged vessel cannot recover upon an insurance against liability for damage to the other. Under the present collision clause claims are to be settled on the principle of cross liabilities when both vessels are to blame. Running-down clauses were introduced into policies in consequence of the decision in *De Vaux* v. *Salvador* (2) that underwriters were not liable under the ordinary policy in respect of the balance which one ship had to pay the other for damages where both were to blame: see *Taylor* v. *Dewar*. (3) Under the present collision clause the underwriters are expressly liable in respect of the money paid by the *Engineer* to the *Harraton*, unless they are protected by the proviso. The words in the proviso exempt them from payments "for removal of obstructions," that is to say, payments made directly by the insured vessel for removal under statutory powers of an obstruction caused by the insured vessel—payments to the authorities who caused the obstruction to be removed. The payment by the *Engineer* was to the *Harraton*, not to the authorities. If it had been intended to exempt from liability in respect of such payment it would have been so expressed. Expenses of raising a vessel often go to reduce the underwriter's liability: it is very anomalous if the proviso is construed so as to make them liable if the vessel is raised by salvors and exempt if it is raised by harbour authorities. The construction put by Barnes J. in *The North Britain* (4) is more rational than the construction adopted by the Court of Appeal in that case.

(1) (1890) 24 Q. B. D. 663.
(2) (1836) 4 Ad. & E. 420.
(3) (1864) 5 B. & S. 58; 33 L. J. (Q.B.) 141.
(4) [1894] P. 77.

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THE "ENGINEER."

Joseph Walton Q.C. and *Scrutton* for the respondent were not heard.

EARL OF HALSBURY L.C. My Lords, I certainly am not desirous of hearing this discussion prolonged, because for some time I have arrived at a very clear conclusion in my own mind, and I confess I adopt the paraphrase of this contract which the then Lord Justice Davey put upon it in *The North Britain.* (1) He says the clause means something of this kind: "I will reimburse you, the injuring vessel, the bill which you have to pay the injured vessel for damages; but, mind, I am not to be called upon to pay, directly or indirectly, for the removal of obstructions under statutory powers." That I believe to be a very proper reading of the language which was actually used by the parties.

My Lords, I agree with what Davey L.J. appears to have said in respect to the mode in which that contract should be construed. In looking at a document between business men I do not think it is wise to look at technical rules of construction. I think it is well to look at the whole document, to look at the subject-matter with which the parties are dealing, and then to take the words in their natural and ordinary meaning and construe the document in that way. I have come to the conclusion that what the underwriters did mean to exclude in their contract of liability was any payment of money for the removal of obstructions to navigation. These damages or this money payable, whichever it is to be called, comes practically within the description. It was a payment actually made by reason of the removal of an obstruction. Therefore, applying the test I have suggested to the contract, I cannot doubt that that was what the underwriters intended to exempt from the contract into which they entered.

Under those circumstances I think that the case which is supposed to have governed the case now before your Lordships does govern it. I think that case was rightly decided; and I therefore move your Lordships that this appeal be dismissed with costs.

(1) [1894] P. 77, at p. 89.

LORDS MACNAGHTEN, MORRIS, and JAMES OF HEREFORD concurred.

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Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, April 28, 1898.

Solicitors for appellants: *Holman, Birdwood & Co.*

Solicitors for respondent: *Waltons, Johnson, Bubb & Whatton.*

J. WILKINSON *v.* BARKING [1948] 1 All E.R. 564.

[HOUSE OF LORDS.]

PASMORE AND OTHERS . . . . . APPELLANTS;

AND

THE OSWALDTWISTLE URBAN DISTRICT COUNCIL . . . . . RESPONDENTS.

H. L. (E.) 1898 *April* 28.

Local Government—Sewers—Factory Refuse—Duty of Local Authority to make Sewers—Remedy for Default—Mandamus—Complaint to Local Government Board—Public Health Act 1875 (*c.* 55) *ss.* 15, 299—*Rivers Pollution Prevention Act* 1876 (*c.* 75), *s.* 7.

The duty of a local authority, under s. 15 of the Public Health Act 1875, to make such sewers as may be necessary for effectually draining their district for the purposes of that Act, cannot be enforced by an action for mandamus brought by a private person: the only remedy for neglect of the duty is that given by s. 299 of the Act, a complaint to the Local Government Board.

The decision of the Court of Appeal in *Peebles* v. *Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 625, affirmed.

ONE Peebles brought an action against the respondents. The parts of the pleadings material to this report were as follows: The statement of claim after referring to ss. 15 and 21 of the Public Health Act 1875, and s. 7 of the Rivers Pollution Prevention Act 1876 continued thus:—

The defendants are the local authority for the urban district of Oswaldtwistle and as such have under their control the sewers within the district. The plaintiff is a paper manufacturer and is the owner and occupier of a factory called the

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Whiteash Paper Mill within the district. 5. The plaintiff desires to cause his drains to empty into the sewers of the defendants and to carry into such sewers the liquids proceeding from his factory or manufacturing processes, and is willing to do all things on his part to be done in that behalf pursuant to the said Acts, but the sewers within the district are not such as are necessary for effectually draining the district for the purposes of the Public Health Act 1875, and in particular are not such as are necessary for effectually draining the plaintiff's premises whereby the plaintiff is unable to cause his drains to empty into the sewers or to carry into them the liquids proceeding from his factory or manufacturing processes. 6. The plaintiff has required the defendants pursuant to the said Acts to cause to be made such sewers as may be necessary for effectually draining their district, and in particular for effectually draining his premises, and to give facilities for enabling him to carry into their sewers the liquids proceeding from his factory or manufacturing processes, but the defendants have refused to comply with such requirements.

The plaintiff claims a mandamus commanding the defendants to cause to be made such sewers as may be necessary for effectually draining their district for the purposes of the Public Health Act 1875, and to give facilities for enabling the plaintiff to carry the liquids proceeding from his factories or manufacturing processes into the sewers under their control.

The statement of defence alleged :—

1. As to so much of the plaintiff's claim as is for a writ of mandamus commanding the defendants to cause sewers to be made, the defendants object that the action does not lie in law and that no such writ can be granted, on the ground that the plaintiff's remedy (if any) is to make a complaint to the Local Government Board pursuant to s. 299 of the Public Health Act 1875, and also on the ground that the only remedy for the defendants' alleged non-compliance with s. 15 of the Act is the making of such complaint, and on the ground that the said writ is claimed only as ancillary to or for the purposes of the claim for the writ in paragraph 2 hereof referred to, and that the plaintiff's claim for such lastly mentioned writ is bad on

the grounds in paragraph 2 hereof set forth, and on the ground that the obligation imposed by the 15th section of the Act does not extend to obligations imposed by the Rivers Pollution Prevention Act 1876 s. 7, nor to provision for the receipt of the liquids from the plaintiff's factory, and on the ground that the plaintiff has disclosed no case shewing that the Court ought to exercise its discretionary power (if any) of granting a writ in the plaintiff's favour.

2. As to so much of the plaintiff's claim as is for a writ of mandamus commanding the defendants to give the plaintiff facilities to carry his liquids into the sewers under the defendants' control, the defendants object that the action does not lie in law and that no such writ can be granted, on the ground that the plaintiff's remedy (if any) is to proceed under and in accordance with the Rivers Pollution Prevention Act 1876 s. 10, and on the ground that this Court has no jurisdiction to entertain the action, the remedy provided for by law being in the county court of the place where the alleged offence against the said Act was committed, and on the ground that s. 7 is not applicable in regard to sewers not yet constructed, and on the ground that the plaintiff has not disclosed any case shewing that the Court ought to exercise its discretionary power (if any) of granting a writ in the plaintiff's favour.

The defence also traversed the allegations in paragraphs 5 and 6 of the claim and alleged (inter alia) that the defendants' sewers were, and when the defendants' sewers then in course of construction were completed the defendants' sewers would be, only sufficient for the requirements of their district.

The plaintiff in his reply joined issue upon the defence. It was admitted that the plaintiff had not given the two months' notice required by the Rivers Pollution Prevention Act 1876 s. 13 before taking proceedings under the Act. Peebles having died his executors (appellants in this House) were allowed to continue the action: see *Peebles* v. *Oswaldtwistle Urban District Council.* (1)

The points of law were by agreement argued before Charles J. before trial of the cause, and that learned judge being of

(1) [1896] 2 Q. B. 159.

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opinion that the plaintiffs were entitled to a mandamus under the Act of 1875, but that the only tribunal for enforcing a claim under the Act of 1876 was the county court, directed that judgment on the points of law submitted to him should be entered for the plaintiff for a mandamus commanding the defendants to cause to be made such sewers as might be necessary for effectually draining their district under the Public Health Act 1875, and in particular the plaintiff's premises in the pleadings mentioned; and for the defendants so far as regarded the plaintiff's subsidiary claim for facilities to discharge their liquids into existing sewers under the Rivers Pollution Prevention Act 1876. (1)

Against the latter part of this decision there was no appeal, but the defendants appealed against the judgment for a mandamus and the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.) entered judgment for the defendants, dismissing the action with costs. (2) Against this decision the plaintiff's executors brought the present appeal. (3)

(1) [1897] 1 Q. B. 384.

(2) [1897] 1 Q. B. 625.

(3) By the Public Health Act 1875 s. 15, "Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act."

Sect. 21 entitles owners and occupiers within the district to cause their drains to empty into the sewers, subject to certain conditions as to notice and otherwise.

By s. 299, "Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers . . . . the Local Government Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, shall make an order limiting a time for the performance of their duty in the matter of such complaint. If such duty is not performed by the time limited in the order, such order may be enforced by writ of mandamus, or the Local Government Board may appoint some person to perform such duty. . . . ."

By the Rivers Pollution Prevention Act 1876 s. 7, "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers:

"Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which

April 26. *Cozens-Hardy Q.C.* and *C. A. Russell Q.C.* for the appellants. Sect. 299 of the Public Health Act 1875 (c. 55) has not the effect, attributed to it by the Court of Appeal, of preventing any private person injured by the neglect of a local authority to provide sufficient sewers from resorting to a court of law. That section defines the duties of the Local Government Board: it does not abridge the rights of parties, and it would be highly inconvenient if the Local Government Board had the right of determining finally the important question of law which arises in this case. The rule that where an Act creates an obligation and provides a remedy no other remedy can be adopted does not apply here. The duty of providing sufficient sewers was not created by the Act of 1875. That duty was dealt with by s. 45 of the Public Health Act 1848 (c. 63), and there was no clause in that Act similar to s. 299 of the Act of 1875. Therefore under the Act of 1848 a mandamus would lie at the suit of a person aggrieved. The Sanitary Act 1866 (c. 90) s. 49 contained enactments dealing with the neglect of duty by sewer authorities and giving powers to one of Her Majesty's principal Secretaries of State to require performance of the duty. The Public Health Act 1875 consolidated the law and repealed the Act of 1848, and also the Act of 1866 so far as it related to the matters under discussion. Therefore in 1875 when that Act was passed a mandamus could be applied for by a private person in case of neglect of duty by the local authority. Sect. 15 of the Act of 1875 practically re-enacted s. 45 of the Act of 1848 and did not touch the question of the right of private persons. It created no new statutory obligation, nor any new departmental duty, and left the recourse to courts of law as it was. The proper remedy for a private person in a

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would from its temperature or otherwise be injurious in a sanitary point of view:

"Provided also that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority."

Sect. 10 gives the county court jurisdiction in offences, including cases of default to perform duties under the Act, and s. 11 gives an appeal to the High Court.

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case like the present is by mandamus: *Glossop* v. *Heston and Isleworth Local Board* (1), per James and Brett L.JJ. In *Robinson* v. *Workington Corporation* (2), relied on by the Court of Appeal, the plaintiff did not ask for a mandamus but claimed damages, to which the Act gives no right.

The next question is whether factory owners are entitled to have their liquids carried away by the public sewers. The right to this is conferred by ss. 15 and 21 of the Public Health Act 1875, and the district cannot be said to be effectually drained within ss. 15 and 21 unless those liquids are carried away. The case is therefore complete under the Act of 1875, independently of the Rivers Pollution Prevention Act 1876 (c. 75) s. 7, which requires sanitary authorities having sewers under their control to give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into the sewers—except where the liquids are noxious or where the sewers are only sufficient for the requirements of the district. There is nothing here to shew that the appellants' liquids are noxious or that the sewers are only sufficient for the requirements of the district. "House" by s. 4 of the Act of 1875 includes factories. "Sewage" is not defined, but s. 17 deals with "filthy water" as distinct from sewage, and both that section and ss. 16 and 17 of the Public Health Acts Amendment Act 1890 (c. 59) contemplate the right to drain into public sewers liquids which could not be described as sewage. The respondents' system of sewers was insufficient to this extent, that there was no sewer with which the appellants could connect so as to carry off their liquids: they ask to have this defect remedied so far as it affects them; it affects no one else, and they claim the right of having the question of law whether they are entitled to thus dispose of their liquids determined by the courts of law and not by a Government department.

Joseph Walton Q.C. and *Danckwerts* for the respondents. The local authority are the sole judges whether the drainage is ineffective or whether it is necessary to make new sewers, subject to the right of appeal to the Local Government Board.

(1) (1879) 12 Ch. D. 102, 115, 122. (2) [1897] 1 Q. B. 619.

The ground upon which the Court of Appeal decided is enough to determine this appeal, namely, that the only remedy for ineffective drainage is by complaint to the Local Government Board under s. 299 of the Public Health Act 1875. The Act of 1848 was merely an adoptive Act: moreover it and the Sanitary Act 1866 were repealed and the obligations created by the Act of 1875 were new obligations. The general rule therefore applies that the statutory remedy is the only remedy: see *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1), per Willes J., and many other cases. Even if it did not the Court has a discretion and ought not to issue a mandamus, where there is another effective remedy.

But there are other answers to the appellants' claim, which comes to this, that if a factory is put up in a district where the sewage system is enough for ordinary purposes, the factory owner can compel the local authority to remodel their whole drainage in order that it may carry away the factory refuse, though that refuse may amount to more than the sewage of the whole district. This is the very case provided for by the last proviso in s. 7 of the Rivers Pollution Act 1876, namely, that in such a case the sanitary authority shall not be required to give facilities for carrying away the factory liquids. That this is the state of things in the respondents' district appears on the pleadings or is the necessary inference from them. In the view taken by the Court of Appeal it was not necessary to give any opinion upon this point. Further, even if there was a grievance under the Act of 1876 the only remedy is that provided by ss. 10 and 11, namely, application to the county court. Apart from the Act of 1876 a factory owner has no right to have the factory refuse pass through the sewers; "sewage" in the Act of 1875 does not include factory refuse; factory processes were not within the purview of that Act.

Cozens-Hardy Q.C. in reply. Sect. 10 of the Act of 1876 does not affect the duty imposed upon the local authority by ss. 15 and 21 of the Act of 1875. The appellants' case rests upon the Act of 1875 and is independent of the provisions of the Act of 1876.

(1) (1859) 6 C. B. (N.S.) 356.

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April 28. EARL OF HALSBURY L.C. My Lords, the question on this appeal is whether a mandamus which was ordered to issue by Charles J. can be supported. According to that learned judge's view it was a mandamus "commanding the defendants to cause to be made such sewers as may be necessary for effectually draining their district under the Public Health Act 1875 and in particular the plaintiff's premises." My Lords, I think it right to call attention to the language the learned judge uses, because I am of opinion that it is the key to what I consider to be the error which the learned judge committed in the course of the judgment he delivered in this case. Your Lordships will observe that the first part of that mandamus "for effectually draining their district under the Public Health Act 1875" follows the language of the statute. Then he has put in this in addition—"and in particular the plaintiff's premises." In the view I take of the statute that was a provision which there was no authority to add to the mandamus at all. There is no such provision in the statute, and it appears to me that the whole purview, object and purpose of the statute is one which would not justify such an addition to the language of the mandamus. The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v. *Bridges*. (1) He says: "where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner." The words which the learned judge, Lord Tenterden, uses there appear to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are repealed; you must take your stand upon the statute in question, and the statute which creates the obligation is the

(1) (1831) 1 B. & Ad. 847, 859.

statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper Government department.

My Lords, it seems to me that if it were possible to conceive a case in which it would be extremely inconvenient that each suitor in turn should be permitted to apply for a specific remedy against the body charged with the care of the health of the inhabitants of the district in respect of drainage, it is such a case as this; and it is illustrated by the form of the mandamus. When I called the attention of the learned counsel to the form of the mandamus, he treated the observation as if it were a question of some mistake made in the pleadings which would be remedied as a matter of course in these days. But that was not the object of the observation, nor is it the importance of the observation. It is that the obligation itself is such that the form of the mandamus becomes of the substance of the argument. You cannot get out of the form of the mandamus. I know no other form which could be adopted than that which has been adopted. But then that shews how important it is that the particular jurisdiction to call upon the whole district to reform their mode of dealing with sewage and drainage should not be in the hands, and should not be open to the litigation, of any particular individual, but should be committed to a Government department.

My Lords, it appears to me that that is enough to dispose of this appeal, because I entirely concur in the judgment of the Court of Appeal, in which it is pointed out that this comes within the very familiar principle of law to which I have called attention.

But Mr. Danckwerts undoubtedly raised another question upon which I will say a word, although I should be sorry to rest my judgment upon that different head of inquiry; and for this reason: it involves a question of fact. Looking at the pleadings, it is logically impossible to deny that upon the pleadings the appellants put themselves out of court by their own allegations, namely, that the insufficiency of the drainage here is an insufficiency which only applies to the particular applicant

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for a mandamus by reason of its being insufficient for him, and therefore brings the matter within the exact words of the Rivers Pollution Act. But although, as I say, I think that is logically irresistible upon the pleadings, and it is impossible for the appellant to deny that on the face of the pleadings he has put himself out of court in that respect by shewing that it is only because of his additional manufactory that the system of drainage is insufficient, yet I should be reluctant to base my judgment on that argument, because it involves really a question of fact which ought not to be concluded by a mere logical application of the pleadings.

I confess, however, that I am wholly unable to see the answer to the argument at present, if the facts are what the pleadings appear to admit them to be, because instead of the Rivers Pollution Prevention Act having, as Mr. Cozens-Hardy ingeniously argued, reference to a different subject-matter, this appears to me to be the very subject-matter that the Legislature was dealing with there. The preamble of that Act recites that it is expedient to make "provision for the prevention of the pollution of rivers," and, having that object before it, the Legislature has obviously intended to look at the system by which the public health is preserved in respect of sewers and drains. What does it then provide? It provides that there shall be an outlet in some form or other for what I may call manufactory refuse; but contemplating the case which might readily arise where some manufacturer would be very glad to throw upon the rates the necessity of getting rid of his own refuse, it provides also, with reference to that obligation to get rid of the refuse, that where the drainage system of a district is "only sufficient for the requirements of their district," there shall not be an obligation to get rid of the refuse of a manufacturer who ought to get rid of the refuse which he is himself creating. That seems to me to be a very intelligible provision, and a very just one; otherwise a manufacturer might come to some very small district, might establish a large manufactory there which would involve, with reference to the law of nuisance, the necessity of getting rid of the refuse created by that manufactory, and there would be no individual obliga-

tion upon the person creating it. But if this section in the Public Health Act could be applied in the way it is sought to apply it here, nothing could be easier than for a manufacturer to establish a manufactory for his own profit and throw upon the rates, paid by all the inhabitants, who have no concern with the manufactory at all, the necessity for providing for that great source of expense to the manufacturer of getting rid of his own refuse.

It seems to me, therefore, that the Legislature very wisely and prudently provided against such a condition of things as that, and if that condition of things exists here as a fact, as upon the pleadings I think it is admitted that it does, I see no answer to the argument that the section in question would not entitle anybody to call upon the particular district to provide for the extra amount of refuse created by the manufacturer.

But, as I have said, I wish to rest my judgment upon the familiar ground upon which the Court of Appeal proceeded, that this is the only remedy provided by the statute for a new obligation created by the statute itself. At the same time I thought it right to go into the other point also, because I can see no answer to the argument Mr. Danckwerts presented.

For these reasons I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

Assuming the appellants to have a just cause of complaint against the Oswaldtwistle Urban District Council, founded on the 15th section of the Public Health Act of 1875, it seems to me to be plain that they can have no remedy outside that Act.

The law is stated nowhere more clearly or, I think, more accurately, than by Lord Tenterden in the passage cited by my noble and learned friend on the woolsack. Whether the general rule is to prevail, or an exception to the general rule is to be admitted, must depend on the scope and language of the Act which creates the obligation and on considerations of policy

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and convenience. It would be difficult to conceive any case in which there could be less reason for departing from the general rule than one like the present. And I must say I am much more impressed by the language of James L.J. in *Glossop* v. *Heston and Isleworth Local Board* (1), in regard to the waste of time and money, and the great inconvenience which would result from recourse to ordinary legal proceedings, than by his suggestion of the propriety of an application to the Queen's Bench Division for a mandamus. The evils of litigation would, I think, be much the same in the one case as in the other.

Besides relying on the expressions which fell from James L.J. in reference to a remedy by mandamus, the learned counsel for the appellants insisted that Lord Esher was not accurate in saying that the obligation imposed by s. 15 of the Act of 1875 was a new obligation. The obligation, as they pointed out, existed under the earlier Acts relating to public health. The Act of 1866, indeed, provided a special remedy by application to the Secretary of State. But in the previous legislation there seems to have been no special remedy provided. Whether the absence of a special remedy in such a matter would justify recourse to legal proceedings is, I think, at least doubtful. The case, perhaps, might properly be regarded as an exception to the general rule laid down in Lord Tenterden's second proposition that "if an obligation is created, but no mode of enforcing its performance is ordained, the common law may in general find a mode suited to the particular nature of the case." However that may be, the real answer to Mr. Cozens-Hardy's argument is that the obligation was never more than a statutory obligation; it did not exist at common law. And the earlier legislation was tentative and experimental. The Act of 1875 was not a consolidating and amending Act. It swept away all the previous legislation and made a fresh start. It is not, therefore, I think, incorrect to say that the obligation is a new obligation.

There is nothing, I think, in the point that the Local Government Board might have to determine a question of construction. I do not see why they should not.

(1) 12 Ch. D. 102.

I agree that the appeal must be dismissed with costs.

LORDS MORRIS and JAMES OF HEREFORD concurred.

Order appealed from affirmed and appeal dismissed with costs.

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Lords' Journals, April 28, 1898.

Solicitors for appellants: *Soames, Edwards & Jones.*
Solicitors for respondents: *Pritchard, Englefield & Co., for C. Costeker, Darwen.*

[HOUSE OF LORDS.]

COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

TOD . . . . . RESPONDENT.

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Revenue—Stamp—Conveyance on Sale—Ad Valorem Duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57—*Heritable Securities (Scotland) Act*, 1894 (57 & 58 *Vict. c.* 44), *ss.* 8, 9.

A bond and disposition in security contained a power of sale. The creditor exposed for sale the property held in security at a price less than the amount due under his security, and failed to find a purchaser. The creditor then applied to the sheriff under s. 8 of the Heritable Securities (Scotland) Act, 1894, and the sheriff issued a decree that the debtors had forfeited their rights of redemption, and that the creditor was vested absolutely in the subjects at the price named:—

Held, reversing the decision of the First Division of the Court of Session, that the transaction constituted a sale to the creditor, and was chargeable, by virtue of ss. 54 and 57 of the Stamp Act, 1891, and the first schedule thereto, with ad valorem duty.

APPEAL from the First Division of the Court of Session sitting as the Court of Exchequer in Scotland. (1)

The case stated the question to be—Whether the instrument given below in the circumstances was liable to be assessed and charged with ad valorem conveyance-on-sale stamp duty;

(1) 24 R. 934.

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or, if not, with what other duty, if any, was it to be assessed and charged. The case set out the terms of the instrument, being an "extract of decree in absence," as follows:—

"At Glasgow, the 26th day of January, 1897, in an action in the Sheriff Court of the county of Lanark, at Glasgow, at the instance of David Tod, Esq., of Eastwood Park, Renfrewshire, pursuer; against David Lamont Rodger, residing at 11, Rylett Crescent, Shepherd's Bush, London, heir-at-law of the deceased David Rodger, writer in Glasgow, and as such heir of provision in trust for the firm of Murdoch & Rodger, writers in Glasgow, and Ebenezer Erskine Scott, chartered accountant, Edinburgh, as trustee for the creditors of the said Murdoch & Rodger and of James Murdoch, writer, Glasgow, and the said David Rodger, defenders; the sheriff in absence found and declared that the defenders had forfeited the right of redemption reserved to the granters in a bond and disposition in security for the sum of twenty-two thousand pounds sterling, dated the tenth, and recorded in the Division of the General Register of Sasines applicable to the County of the Barony and Regality of Glasgow the eleventh, both days of September Eighteen hundred and seventy-three, granted quoad the personal obligation by the said Murdoch & Rodger and James Murdoch and David Rodger, the individual partners of the said company or firm of Murdoch & Rodger, and quoad the disposition in security by the said James Murdoch and David Rodger, the only partners of the said firm of Murdoch & Rodger and trustees for said company or firm and partners thereof, in favour of the pursuer (therein designed as of Ironbank, Partick), and that the said right was extinguished as from and after the said date hereof, and that the pursuer had right to and was vested in,—In the first place, All and Whole . . . .; in the second place (primo), All and Whole . . . . and (secundo) one-half pro indiviso of All and Whole . . . .; in the third place, All and Whole . . . .; and in the fourth place, All and Whole . . . ." [the subjects are certain heritable subjects in Glasgow, particularly described in the said bond and disposition in security] "as absolute proprietor thereof, but subject always to the burdens, and conditions contained or referred to in the said bond and disposi-

tion in security (that is to say), ... the whole conditions, provisions, restrictions, declarations, prohibitions, servitudes, clauses irritant, resolutive, and others specified in" [certain instruments of sasine, a deed of allocation, and a feu-contract, particularly referred to], "at the price of twenty-seven thousand pounds (the sums due under the said bond and disposition in security at the term of Whit-sunday Eighteen hundred and ninety-six, being twenty-eight thousand four hundred and eighty-three pounds two shillings and twopence), and decerned; and granted warrant to record this extract decree in the Register of Sasines.—Extracted at Glasgow, this ninth day of February 1897, by me, Sheriff-Clerk-Depute of Lanarkshire.

"Alex. Pearson, Sheriff-Clerk-Depute."

It appeared that David Tod, the respondent to this appeal, was the holder of a bond and disposition in security, and in exercise of his power of sale he exposed the subjects for sale by public auction, and, failing to find a purchaser, he in January 1897, under s. 8 (1) of the Heritable Securities (Scotland) Act,

(1) By s. 8 of the Heritable Securities Act of 1894, "Any creditor who has exposed for sale under his security the lands held in security, at a price not exceeding the amount due under the said security, and under any prior security, and any security or securities ranking pari passu with the exposer's security (exclusive of the expenses attending the exposure or prior exposures), or at any lower price, and has failed to find a purchaser, may apply to the sheriff for decree in the terms of Schedule D hereto annexed, and the sheriff may after service on the proprietor and on the other creditors, if any, and after such intimation and inquiry as he may think fit, grant such application and issue decree in the said terms. On such decree being pronounced, and an extract thereof in which said lands shall be described at length, or by reference recorded in the appropriate Register of Sasines, the right of redemption reserved to the debtor shall be extinguished, and the creditor shall have right to the lands disponed in security in the same manner and to the same effect as if the disposition in security had been an irredeemable disposition as from the date of such decree, and upon registration of an extract of such decree in the appropriate register, the lands shall be disencumbered of all securities and diligences posterior to the security of the said creditor; or, instead of granting such decree, the sheriff may, upon any such application being made to him as aforesaid, appoint the lands held subject to the security to be re-exposed for sale at a price to be fixed by him, and in that event the said creditor shall have right to bid for and purchase the said lands at such sale, and in the event of the creditor purchasing, the sheriff may issue decree in the form and to the effect aforesaid, or the creditor may grant a disposition of the lands to himself in the

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1894, obtained the above-mentioned instrument from the sheriff; and subsequently he submitted the said instrument to the same manner as if he had been a stranger."

The following is Sched. D, referred to in s. 8:—

"The sheriff having resumed consideration of the said petition finds and declares that X. Y. (the debtor in the bond) has forfeited the right of redemption reserved to him in the said bond and disposition in security, and that the said right is extinguished as from and after this date, and that A. B. (design him) the petitioner has right to, and is vested in, the lands described in the said bond and disposition in security, dated and recorded as aforesaid, as absolute proprietor thereof, but subject always to the burdens and conditions contained or referred to in the said bond and disposition in security at the price of £—— [*here mention the price at which the lands were last exposed, or the price at which the lands have been bought in, as the case may be*] and decerns; and grants warrant to record the decree to be extracted hereon in the Register of Sasines."

"NOTE—The extract decree is to describe the subject."

Sect. 9 of the Heritable Securities Act was: "Upon a sale being carried through under the immediately preceding section and upon consignation of the surplus of the price, if any, over the sum due under the security, in terms of the Titles to Lands Consolidation (Scotland) Act, 1868, or upon the execution and recording of a certificate that there is no surplus in terms of the Conveyancing (Scotland) Act, 1874, the right and title of the creditors to the lands shall be absolute and irredeemable, and the lands shall be disencumbered of securities and diligences in the manner and to the effect provided for in the said statutes as regards sales carried through in virtue thereof. Provided always that the personal obligation of the debtor shall be reserved in full force and effect so far as not extinguished by the price at which the lands have been acquired."

Sect. 10: "No purchaser from the creditor or other successor in title in the lands shall be under any duty to inquire into the regularity of the proceedings under which such creditor has acquired right to the lands held under his security by virtue of the provisions contained herein or be affected by any irregularity therein without prejudice to any competent claim of damages against such creditor."

Sect. 11: "Any creditor holding a security ranking pari passu with another security who desires to sell the lands conveyed in security by his security, and who is unable to obtain the consent of the creditor holding such other pari passu security to a sale, may apply to the sheriff for warrant to sell the said lands, calling such other creditor as defender; and the sheriff, after hearing parties and making such inquiry as he thinks fit, may order a sale of the said lands if in his opinion it is reasonable and expedient that such sale should take place; and, in case of difference of opinion, the sheriff may fix the price, authorize both or either of the parties or some other person to carry through the sale, and upon payment or consignation of the price to grant a conveyance, and disencumber the lands of the said securities in the same way and as fully as if the creditors therein were by

Commissioners of Inland Revenue for their opinion as to the stamp duty with which it was chargeable. The commissioners were of opinion that the instrument was chargeable in terms of s. 54 (1) of the Stamp Act, 1891, with ad valorem duty as a conveyance on sale, and that under s. 57 of the Stamp Act the sum upon which such duty was chargeable was 27,000*l.*, which sum was set out in the instrument as the price of the subjects.

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agreement carrying through said sale, and also to fix the times and conditions of sale in conformity with the law and practice relating to premonition and advertisement. And the expenses of and connected with the sale shall be payable preferably out of the price or proceeds of the sale, and the balance of such price or proceeds, after providing for such expenses, shall be paid to the creditors in the securities charged upon the lands according to their just rights and preferences."

(1) Sects. 54 to 61 inclusive of the Stamp Act, 1891, occur under the heading "Conveyances on Sale."

By s. 54, "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf, or by his direction."

By s. 57, "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty."

Sect. 62 occurs under the heading "Conveyances on any occasion except sale or mortgage."

By s. 62, "Every instrument and every decree or order of any Court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is to be charged with duty as a conveyance or transfer of property: Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings."

By the first schedule of the Stamp Act, 1891, there are charged the following stamp duties:—

"(*a*) Conveyance or transfer on sale of any property (except such stock as aforesaid), where the amount or value of the consideration for the sale does not exceed 5*l.*," and so on. "For every 50*l.*, and also for any fractional part of 50*l.* of such amount or value, 5*s.* And see ss. 54, 55, 56, 57, 58, 59, 60, and 61."

"(*b*) Conveyance or transfer by way of security of any property (except such stock as aforesaid), or of any security. See mortgage, &c., and marketable security."

"(*c*) Conveyance or transfer of any kind not hereinbefore described, 10*s.* And see s. 62."

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They accordingly assessed the ad valorem duty as 135*l.* upon the instrument.

The respondent appealed to the First Division of the Court of Session, and contended that the instrument was not a conveyance on sale, and that if any duty was payable it was only the deed duty of 10*s.* under s. 62 of the Stamp Act, 1891.

The First Division of the Court of Session (the Lord President Robertson and Lords Adam and Kinnear) reversed the determination of the Commissioners, June 16, 1897.

The ratio decidendi of their Lordships' opinion is given by Lord Herschell.

May 3, 10. *Sir Richard E. Webster, A.-G., A. Graham Murray, L.A.* (with them *Scott Dickson, S.-G.* (for Scotland), and *A. J. Young*), (all of the Scottish Bar except the first) for the Crown. The decision of the Court of Session was erroneous. That Court thought the instrument in question came under s. 62 of the Stamp Act of 1891, but the marginal note "transfer or conveyance on sale" in the schedule, and ss. 54 and 57 under the head "conveyances on sale," include this case.

By s. 54 the expression "conveyance on sale" includes every instrument and every decree or order of any Court whereby any interest in any property upon the sale thereof is transferred to or vested in a purchaser. And s. 57 deals with cases "where any property is conveyed to any person in consideration of any debt due to him." That last section can be appreciated by reading the Heritable Securities Act of 1894. Prior to that Act the mortgagee in Scotland could not himself purchase the property or bid at the sale. Now the Act gives the mortgagee the power of buying—in effect makes him a purchaser, and a purchaser on a sale. Before this Act the only way the Scottish mortgagee could get the property would be to have it sold to another person and buy it back from him. The effect of a foreclosure decree in England and the effect of a decree under the Act of 1894 in Scotland is to put the mortgagee or the security holder in a position to get the property "at a price." Sect. 8 of the Act of 1894 gave two methods. First, any creditor who has exposed the land for sale under

his security and has failed to find a purchaser may apply to the sheriff for a decree in the terms of Sched. D. Or, secondly, instead of granting such decree off-hand, the sheriff may re-expose the property for sale at a price to be fixed by him; and in that event the creditor shall have the right to bid for and purchase the said lands. The two cases fall under the same rules having regard to what a sale is—namely, a transfer of property "at a price." The transaction is in either case to be regarded as a sale for the purposes of the Stamp Act; the only difference in the second case being that if the sheriff thinks there ought to be another opportunity to realize the property then there is to be a re-sale. Sect. 9 speaks of all operations under s. 8 as being "sales." The whole machinery is that of purchase and sale: see Sched. D; see also ss. 10, 11.

The *Great Western Ry. Co.* v. *Inland Revenue* (1) and *Foster & Sons* v. *Inland Revenue* (2) laid down the broad principle that under the Stamp Act where property is transferred for money's worth that is a conveyance on sale.

In *Heath* v. *Pugh* (3) it became very material to consider what was the actual position of a mortgagee under a legal foreclosure decree. Lord Selborne L.C., in delivering the judgment of the Court of Appeal, said: "The effect of an order of foreclosure absolute is to vest the ownership of and the beneficial title to the land for the first time in the person who previously was a mere incumbrancer." That is, that the foreclosure is a new purchase of land, for the mortgagee ceases to be a mere incumbrancer, and becomes for the first time absolute owner. Earl Cairns (4) in this House concurred in Lord Selborne's view. In *Huntington* v. *Inland Revenue* (5) it was decided that the deed of conveyance following on a decree of foreclosure in an equitable mortgage came under ss. 54 and 57. And on principle one cannot see how the two cases can be distinguished. (6) The deed executed in *Huntington's Case* (5) was mere machinery. It merely

(1) [1894] 1 Q. B. 507.
(2) [1894] 1 Q. B. 516.
(3) (1881) 6 Q. B. D. 345, 360.
(4) (1882) 7 App. Cas. at p. 237.
(5) [1896] 1 Q. B. 422.
(6) See amendment added to Finance Bill, 1898, part 3: "It is hereby declared that the definition of 'conveyance on sale' in s. 54" of the Stamp Act, 1891, "includes a decree or order for, or having the effect of, an order for, foreclosure."

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carried out what the foreclosure decree had done: it added nothing more. It was argued in that case that the order had simply barred the mortgagor's right to redeem, and that there was no passing of the property and nothing that could be said to be a sale within the meaning of s. 54. The Crown argued that it was brought under ss. 54 and 57, citing *Heath* v. *Pugh* (1) and *Foster & Sons' Case* (2) to shew that when property passes "at a price" or "for value" it was a sale within the meaning of the Stamp Act. Sect. 54 seems to include that class of transaction which is a sale and which would be carried out by a decree of the Court only. But we have not here the difficulty referred to by Kennedy J. (3), for we can deduce from the Act of 1894 that so much of the money fixed for the price at which the creditor tries to sell at is taken as the consideration.

The old form of Scottish heritable security had originally nothing to do with personal covenant. The older forms of heritable securities were what were called wadsets. The wadset was a pure pledge; that is, lands were disposed as a pledge. They were divided into proper and improper wadsets. The proper wadset being when a man took the land as a pledge upon the chance of the land bringing in the interest of the debt or not. And an improper wadset was where the creditor had to count and reckon and never could get more than his proper interest. The peculiarity was that there was no obligation for the payment of the principal, though, of course, if the debtor chose to pay the principal he could get rid of the wadset. Then the heritable bond really had its origin in the ecclesiastical law against the exaction of interest, and in view of getting round that the heritable bond contained an obligation by which the grantee was infeft in the annual rent payable out of the lands. There, again, in the old form of heritable bond there was no personal obligation. Then in the more modern form a personal obligation was superadded for the repayment of the money; but the security writ still consisted of an obligation to infeft in the annual rent out of the lands. The lands themselves were not disponed, but the creditor was infeft in the real burden of so much more per annum to be

(1) 6 Q. B. D. 345.
(2) [1894] 1 Q. B. 516.
(3) *Huntington* v. *Inland Revenue*, [1896] 1 Q. B. at pp. 429, 430.

taken out of the lands, and the creditor's remedy if not paid were the two well-known actions of "mails and duties" and "poinding the ground." Mails and duties meant that by an appropriate process of law the creditor could have the tenants of the lands ordained to pay their rent to him instead of to the true owner. Poinding the ground meant that the creditor could seize all the movables that were upon the land—all those belonging to the debtor, the proprietor absolutely; and those of the tenants originally absolutely, but by a subsequent equitable modification the seizure was restricted to the amount of the rent then due. These two classes of security were practically merged into one in the modern form of bond, and accordingly a bond and disposition in security is really an amalgamation of two things—the one the personal covenant for the money by which the debtor binds himself to pay the principal and interest; the other by which in security of the personal obligation he dispones the lands, and thus gives real remedy against them; to all of which is superadded a power of sale. Accordingly at this moment, if the creditor desires repayment under a bond and disposition in security, he need not, as a matter of fact, go through any of the forms which are necessary in making good the real part of the security, but he may execute a charge; that is, he may charge the debtor to pay the money within a certain number of days: *M'Whirter* v. *M'Culloch's Trustees*. (1) As to the real security, that was a disposition of the lands heritably and redeemably, and never did any more than create an incumbrance on the land. In the modern bond and disposition in security there was superadded to the old form a power of sale on non-payment, and the style of the bond was altered to heritable and redeemable, but irredeemable in the event of the power of sale hereinafter mentioned being exercised. The Court of Session exercised a supervising power over the way in which that power of sale was exercised; and see the Scottish conveyancing statutes of 1857, 1858, 1868, and 1874. The exposer of the property, that is the creditor, could not sell to himself. If it were proved, that a heritable creditor had exposed lands for sale and had then

(1) (1887) 14 R. 918.

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bought himself, the sale would be set aside. That was the law up to 1894. It follows that there was nothing in the bond and disposition itself which operated as a transfer. Then the Act of 1894 said, "We have found there has been a dead-lock when it has been found impossible to obtain a purchaser. There may be cases, when such is the case, that the creditor may be willing to come in and take the land at the proper value, and we will make an enactment to that effect." But the transaction under the Act of 1894 is none the less a sale. There was no attempt in the statute to make the original security writ other than a security writ. It all has its root in the power of sale. If there was no power of sale in the deed, s. 8 of the Act of 1894 would not apply. If the creditor had granted a disposition to himself as if he had been a stranger, it seems to be admitted that the ad valorem stamp duty would have been payable. But it would be curious if the payment of ad valorem duty depended upon whether one of two alternatives was taken by the creditor. The learned judges in the Court of Session said there must be a consensual agreement to constitute a "sale." But when persons have a right to take land compulsorily there can hardly be said to be a consensual agreement; yet it is a sale: *Glasgow and South Western Ry. Co.* v. *Inland Revenue.* (1)

Aitken (of the Scottish Bar), and *Edward F. Spence*, for the respondent. The judgment of the Court below is right in holding that this case is not within the region of a contract of sale. By the Stamp Act certain conveyances are singled out for special revenue—"a conveyance or transfer on sale" and "conveyance or transfer by way of security," and the next is "conveyance or transfer of any kind not hereinbefore described." Unless the particular document distinctly falls within the enacting clause, it cannot be brought into it by construction. A sale is an ordinary consensual contract whereby one party sells and another party buys a particular subject at a particular price: Benjamin on Sales. What in Scotland would fall directly under s. 54 would be a decree of adjudication in implement; that is to say, where there is a sale constituted by missives, and then on a refusal to convey the vendee can come

(1) (1887) 12 App. Cas. 315.

to the Court and get a decree of adjudication in implement of the sale, and upon registration in the Register of Sasines make it a real right and vest the property. Before registration it is simply a personal right. It is the decree of adjudication which is the decree contemplated by s. 54. The respondent is not a purchaser. What he has got is a decree which says that the right of redemption is extinguished, and that the property held in security is vested in him. All that the decree did was to take away the right of redemption. The price is not the value of the property, because no one has offered it.

[LORD MACNAGHTEN. It is the price which the sheriff thinks under the circumstances a fair value.]

Unless it clearly and absolutely appears that this is a process of law by which the property "passes on sale" it does not come within ss. 54, 57. The respondent gets his remedy in order that the property may not be sacrificed, but that taking of it over is not upon a contract of "sale." The first alternative of s. 8 is finished at the semicolon; then the section proceeds with the second alternative, and it is to that alone that s. 9 applies. Nor does the proviso at the end of s. 9 affect the argument. The bond and disposition in security was a right of pledge which, before 1894, could not be realized by a sale to a third party, and the respondent's contention is that, the creditor having tried and failed to sell the land held in security, the law gives him a right to take it himself as the mode of enforcing his security. *Huntington* v. *Inland Revenue* (1) does not apply, for there there was a conveyance, and there is none here. In *Scottish Equitable Life Assurance* v. *Inland Revenue* (2) there was really a sale. The respondent founds on the English cases of the *Great Western Railway Company* and *Foster & Sons*, because there, before the Court held itself entitled to impose this duty, they first found it necessary to decide that there was something absolutely equivalent to a sale.

[EARL OF HALSBURY L.C. It may be a sale within the sense of the Act of 1894; and then may not the Stamp Act apply?]

The Stamp Act has imposed the highest stamp upon a consensual contract of sale.

(1) [1896] 1 Q. B. 422.

(2) (1894) 22 R. 85.

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[LORD HERSCHELL. It is not limited to a consensual contract of sale. If a man's property is taken from him against his will, say, under the Lands Clauses Acts, at a price fixed, there is a contract of sale; there is no consensus in that case.]

That is on the principle of public policy. There is no doubt that it would be extremely difficult to hold that it was not a sale if the sheriff, acting under the latter alternative of s. 8, thought the price inadequate, and ordered another sale and the creditor bought; or if the creditor executed a disposition to himself, because there he would have a conveyance and a sale. But under the first part of s. 8 the consideration is obviously not the price, because the property has been put up and no one has bid for it. It is an amount which no one will give. The right of redemption is extinguished, and the petitioner has a right to and is vested in the property: there is no word of transfer; and the section goes on to say that he holds lands disincumbered, not from the date of the decree, but from the date of the bond; therefore it is no transfer, but a retroactive diligence.

[LORD MACNAGHTEN. It is a sale in the strictest sense of the word.]

Under the first part of s. 8 you have a simple foreclosure; and under the second part you have a sale. The section applied to two distinct operations: first, foreclosure; secondly, actual sale; to make an offer for somebody else's property at a price that would not be a sale: see Lord Herschell's argument in *Graff* v. *Evans*. (1)

[LORD HERSCHELL. The ground there was that the alleged purchaser only acquired his own property; this property is not the creditor's until he acquires it under the decree.]

There is a practical analogy between the disponee and the mortgagee in England. In each case there is a right of taking possession, while neither could become the purchaser himself if he put it up for sale. In *Huntington's Case* (2) the Inland Revenue thought they had the easier case of equitable mortgage where there is the condition of a conveyance. But the Court seems to have distinguished between a decree in the case

(1) (1882) 8 Q. B. D. 373. (2) [1896] 1 Q. B. 422.

of a legal mortgage and a decree in an equitable mortgage. (1) If you take an equitable mortgage you pay only one shilling, whereas if you take a legal mortgage you pay two and sixpence. That is one of the difficulties against holding that a legal foreclosure can be stamped with an ad valorem duty; other difficulties are set out in *Marshall* v. *Shrewsbury* (2) and *Lockhart* v. *Hardy*. (3) When the Legislature imposes a tax upon the subject it must do so in clear and distinct terms, for if the matter remains in doubt the subject is entitled to exemption: Lord Esher in *Inland Revenue* v. *Angus* (4); and see also *Phillips* v. *Morrison*. (5)

As to costs, shortly after the Act came into force the Commissioners of Inland Revenue wrote to the Sheriff-Clerk of Lanarkshire that the stamp to be imposed on this class of decree was to be ten shillings; therefore this is not a case in which costs ought to be given, it being a case to settle the practice. If the decision is reversed, it will reverse what has been the practice.

LORD HERSCHELL. In this case there was a bond and disposition in security which contained, as is commonly the case, a power of sale. Under that power of sale the property was exposed for sale at a price not exceeding the amount due under the security; there was no purchaser. Thereupon the creditor, under the provisions of the 8th section of the Heritable Securities (Scotland) Act, 1894, applied to the sheriff for a decree in the terms of Sched. D of that Act, and that decree was made by the sheriff. The question has arisen whether that decree should be stamped with an ad valorem stamp as coming within the terms of s. 54 of the Stamp Act, 1891, or whether it should be charged only with the duty prescribed in s. 62 of that Act.

Now, s. 54 of the Stamp Act of 1891 includes within the expression "conveyance on sale," amongst other things, "every decree or order of any Court" "whereby any property or any

(1) See note (6), ante, p. 405.
(2) (1875) L. R. 10 Ch. 250.
(3) (1846) 9 Beav. 349; 15 L. J. (Ch.) 347.
(4) (1889) 23 Q. B. D. 579, 589.
(5) (1844) 13 L. J. (Ex.) 212.

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estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser." Of course, it is not in question that by this decree of the sheriff, property, or an estate, or interest in property, was transferred to or vested in the creditor, but the dispute between the parties is whether it was so transferred or vested "upon the sale thereof" within the meaning of the 54th section.

Prior to the Act of 1894, although the creditor himself might be willing to purchase the property—that is to say, to acquire the entire title to the property—it was not competent for him to do so: he could not bid at the sale; and, consequently, under the power of sale, he was unable to become the purchaser. But, by the provisions of the 8th section of the Heritable Securities Act, 1894, any creditor who has taken steps to sell lands which he holds in security may become, to use for the moment a neutral expression, the absolute proprietor of that estate at a price, retaining his rights in respect of the personal obligation of the debtor to anything in excess of the price at which he so becomes the proprietor. It is to be observed that he can only so become the proprietor after exposing the lands held in security for sale; and, further, that the effect of the bond and disposition is only to create a real burden upon the lands. That is the right of the creditor, the title to the lands subject to that real burden remaining in the original proprietor. After the decree the title is completely vested in the creditor and he becomes the proprietor.

When the creditor applies to the sheriff for his decree, the sheriff may consider that the property has not been exposed under the most favourable conditions for securing the best possible price. He may think that it ought to be again exposed for sale; and if so he is to fix the price at which it is to be again exposed for sale, and then the latter part of the section comes into operation, to which I will recur in a moment or two. But if the sheriff does not require another exposure for sale, that must be on the ground that he regards the price at which it was exposed by the creditor as the highest price which, under the most favourable conditions of sale, could be anticipated as being likely to be given by any bidder, including

the creditor himself. Having come to that conclusion, he makes the decree.

Now, what are the terms of the decree? It declares that the debtor "has forfeited the right of redemption reserved to him in the said bond and disposition in security, and that the said right is extinguished as from and after this date, and that the petitioner has right to and is vested in the lands described in the said bond and disposition in security" "as absolute proprietor thereof" "at the price of" so many pounds. Then there is to be inserted "the price at which the lands were last exposed, or the price at which the lands have been bought in." Now, my Lords, is not that in substance and in effect a provision that under those circumstances the creditor shall be treated as the purchaser, that the lands shall be adjudged to him as purchaser at the price at which he exposed them for sale, and which, in the opinion of the sheriff, is the highest price which any one, even including the creditor, would give? That, I confess, seems to me the substance of the transaction —the lands which were the property of the debtor are transferred to the creditor, and they are transferred to him at a price. I cannot see why it is the less a sale to him at that price than if they had been put up again for sale, and he had bid that price himself, because he puts them up although the sheriff fixes the price at which they are to be put up, and he bids the price at which they are adjudged to him and in respect of which the decree is made. I cannot see the slightest difference in principle on that account.

The effect and the meaning, I think, of this 8th section was to enable in such a case the exercise of a power of sale to be carried through in such a manner as that the creditor might be the purchaser himself at a price which he is willing to give for the lands, and which, in the opinion of the sheriff, is a sufficient and proper price, rendering unnecessary any further competition.

In the second case, where the sheriff directs the lands to be re-exposed for sale at a price which he fixes, it is provided that the creditor shall have the right to bid for the purchase of the lands at such sale. If he bids, and, to use the language of

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the statute itself, "purchases" at such sale, the lands become vested in him by one of two means: either the sheriff may issue a decree in the very same form in which he is to issue a decree under the earlier part of the section if he thinks no second sale is necessary, or the creditor may grant a disposition of the lands to himself. Now, it was, I will not say admitted by the learned counsel, but he had difficulty in contesting, that if the creditor had granted a disposition to himself in the same manner as if he had been a stranger, there would not have been an ad valorem duty payable in respect of the conveyance upon the sale of those lands. But it is scarcely open to contention if that be so that it cannot make any difference whether one form of carrying out the transaction or the other is adopted by which the land is vested in the creditor, because the result is precisely the same; and if a disposition granted by the creditor to himself would be a "conveyance upon a sale" within the meaning of s. 54, it seems to me absolutely certain that a decree vesting the property in the creditor in the form of the schedule must equally be a "decree vesting the property upon a sale" within the meaning of s. 54.

It is to be observed that by the proviso at the end of s. 9, "the personal obligation of the debtor shall be reserved in full force and effect so far as not extinguished by the price at which the lands have been acquired." The creditor is treated, as it seems to me, as the purchaser at that price, and then the obligation of the debtor, except so far as by that price his obligation had been discharged, remains in full force and effect.

It has been said, and I agree, that the tax is not to be regarded as imposed unless the words in the statute are clear. Now, it is clear that by s. 54 the intention was to include all instruments within its scope where property was "vested or transferred upon the sale thereof," and it seems to me that in substance (I am not speaking simply of the language used or the form) that is the effect of what is done by a proceeding under s. 8 of the Heritable Securities Act, 1894.

I regret to differ for these reasons from the learned judges in the Court below; but I cannot help observing that what

seems to me to be a very important circumstance, namely, that in the decree the lands are vested in the creditor at a price, namely, the price at which he exposes them for sale, is not referred to in the judgments. Nor is the fact referred to that the form of decree is applied indifferently to the case of the creditor being adjudged to be entitled to the lands at that price under the first part of s. 8, and to his being adjudged purchaser on bidding at a subsequent sale if the sheriff thinks it necessary that they shall be exposed to a sale again under the latter part of the section. My Lords, the Lord President says, "The question, therefore, comes to be whether the unsuccessful exposure to sale and the application to the sheriff constitute a sale in the sense of the 54th section." It is not, in my opinion, merely an unsuccessful exposure to sale and an application to the sheriff, but it is the decree which the sheriff makes after and in connection with those two occurrences by which he vests the property in the creditor at the price at which it is put up for sale.

Then Lord Adam says, "There is no disposition contained in this instrument at all—no conveyance by any seller whatever—there is no disponee." And Lord Kinnear says that, "A sale of land is a consensual contract by virtue of which the seller becomes bound to convey the land which is the subject-matter of the contract to the buyer for a price, and the conveyance on sale must be a conveyance which is executed in the performance of such a contract. There is no such contract here." My Lords, in the case of the creditor himself bidding at a sale at which the lands are exposed at a price fixed by the sheriff, there is no more a consensual contract than there is in the case now before your Lordships. Who are the consenting parties to that contract? The lands are equally put up by the creditor, and the creditor himself becomes the purchaser. What is the consensual contract in that case in respect of which the decree is the instrument carrying out that consensual contract? No doubt the creditor consents to take the lands at that price; but so he does in the first case, because, having exposed the lands for sale at that price, he applies to the sheriff to adjudge them to him at that price. In both cases equally

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he consents to the land becoming his at that price, and there is no more consensual contract in the one case than in the other. And when it is asked who is the seller, the same difficulty may be put in the case of the creditor becoming the purchaser: he is allowed to sell to himself—he is both seller and purchaser. Without that statutory provision, that would be incompetent according to law, but the statute has provided for it. It has, in effect, enacted that notwithstanding that difficulty he may, under the safeguards which the statute has provided, be both seller and buyer of the property.

For these reasons, my Lords, I am unable to concur in the view adopted by the Court below. It seems to me that this was a decree by which property was "transferred upon the sale thereof."

With regard to the question of costs, the Crown does not ask for them, and I think quite rightly. The matter when it was first raised and brought to the notice of the Commissioners of Inland Revenue appears not to have struck them in the light in which they now regard it, and which has given rise to this litigation. They having at that time publicly made known their view that the ad valorem stamp was not required, but only a stamp under s. 62, I think it is quite right that they should not have any costs of this litigation. Of course, the respondent must repay to the Crown the costs which the Crown was compelled to pay to him in the proceedings in the Court below.

It has been said that difficulties may be caused by the decision which your Lordships are about to pronounce owing to the view of the Commissioners of Inland Revenue having been acted upon in several cases. Of course, it is not like a long-standing course of practice, because the question only arose for the first time in the year 1895; but with these difficulties your Lordships are in no way able to deal. All you have to do is to determine what is the true construction of the statute of 1891 in relation to transactions under the Heritable Securities Act of 1894. The only remedy would be—and I own it does not seem to me to be an unreasonable suggestion in respect of the transactions which have taken place upon the faith of the view propounded by the Commissioners of Inland Revenue in the

first instance—for the Legislature to intervene, so that transactions which have taken place upon that basis should be validated, and only in those which might take place subsequently to this decision the duty should be enforced, according to the law which your Lordships are about to lay down.

I move your Lordships that the judgment appealed from be reversed: that each party do bear and pay their own costs here and in the Court below: that the respondent do pay to the appellants the costs he has received from them.

My Lords, I ought to add that my noble and learned friend the Lord Chancellor (1) desires me to say that he has heard substantially the argument for the respondent, and that he entirely concurs in the view that the judgment of the Court below should be reversed.

LORD MACNAGHTEN. I am of the same opinion. I think that the transaction under consideration was in reality a sale, and that the sheriff's decree was, in the words of the Stamp Act, a decree by which the property was "vested in" the creditor "upon the sale thereof."

The proceedings under the Heritable Securities Act are very simple, and I think their effect is plain. The creditor having put the property up for sale at a price not exceeding the amount due under his and other securities, and having been unsuccessful in his attempt to sell it, comes to the sheriff and says, in the words of the 8th section, "I have 'failed to find a purchaser'; I cannot buy the land myself out of court; I ask you to allow me either to be the purchaser at the price at which I have put it up for sale, or to give me the chance of becoming the purchaser at a price which you fix." My Lords, if the transaction is carried out in either of those ways, it seems to me to be a sale, and nothing else. The same form of decree applies to both cases—in each the property held in security by the creditor is declared to be vested in him as absolute proprietor at a certain price.

With regard to the English authorities which were cited, I

(1) The Earl of Halsbury L.C. had to withdraw to attend a Cabinet Council just before the counsel for the respondent concluded their arguments.

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think it is quite enough to say that the analogy between a foreclosure decree and a decree under the Heritable Securities Act is not so close as to make it necessary to consider them.

LORD MORRIS. I am of the same opinion. The question is, shortly, whether under the Stamp Act a decree by the sheriff transferring property is a decree "upon the sale thereof." The decree is in the form prescribed by Sched. D of the Heritable Securities (Scotland) Act, and that form of decree seems to contemplate the two alternatives set forth in s. 8 of that Act—the first, where the sheriff makes the decree at once on the application of the creditor, and the second alternative, where, instead of so granting a decree at once, he directs that the property shall be exposed for a re-sale at an upset price fixed by him. Those two alternatives are both contemplated in the words in a parenthesis in Sched. D. In the first case, the price to be inserted where the blank is left in the schedule would be "the price at which the lands were last exposed" for sale before the application was made. In the case of the second alternative referred to in s. 8, the words inserted would be "the price at which the lands have been bought in," which is the alternative in the parenthesis. In both cases it is treated as a sale. If it is a sale in the second alternative, it appears to me to be a sale in the first alternative.

Again, my Lords, s. 9 would appear to me to be almost decisive, if not entirely decisive, upon the question of what should be the construction. It depends upon whether you apply the words "upon the sale being carried through" to the whole of the preceding section, or only to the immediately preceding part of the 8th section. If they are to be applicable to the whole section, s. 9 describes the transaction, whether taking place under the first or the second alternative, as a "sale." If the words "upon a sale being carried through" are to be applied only to the second alternative, that would be a statement by the Legislature that it did not apply to the first alternative, and that that was not a "sale." I am of opinion that the words "upon a sale being carried through under the immediately preceding section" apply to both alternatives. It

is necessary that they should apply to the first alternative by reason of the proviso, which says, "Provided always that the personal obligation of the debtor shall be reserved in full force and effect so far as not extinguished by the price at which the lands have been acquired." That proviso could scarcely be a proviso upon a section which previously had not applied to the subject-matter.

Upon those grounds, my Lords, I am of opinion that the judgment of the Court in Scotland should be reversed.

Ordered, That the judgment appealed from be reversed: That the parties each bear their own costs in this House and in the Court below: That the respondent do repay to the appellants the costs he has received from them.

Lords' Journals, May 10, 1898.

Agents for appellants: *F. C. Gore, Solicitor (English) Inland Revenue, for Philip J. Hamilton Grierson (Scottish), Inland Revenue.*

Agent for respondent: *Lindo & Co., for John Steuart & Gillies, Writers, Glasgow.*

[HOUSE OF LORDS.]

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BAIRD . . . . . APPELLANT;

AND

BELL OR ALEXANDER . . . . . RESPONDENT.

Boundary Wall—Mutual Gable—Half Cost of Erection.

The proprietor of two adjoining building plots erected a house upon one of them, building the whole gable half upon one plot and half upon the other plot. He afterwards conveyed the plot with the house upon it to A. The mutual gable, resting partly on the two plots, was described in the conveyance as a mutual gable. He subsequently sold the other plot, and the purchaser proceeded to erect a house upon it, making use of the mutual gable. In the letters of sale to A. the vendor said: "The unused half of the gable and boundary walls is not included in the offer." In an action by A.'s successor against the purchaser of the second plot for half the cost of the mutual gable wall, the defendant relied upon the words of the letters as shewing that A. had not acquired the claim for recompense for the unused half of the gable:—

Held, affirming the decision of the Second Division of the Court of Session, that A.'s successor was entitled to claim from the purchaser of the second plot one-half of the value of the mutual gable, and that there was no inconsistency between the letters of sale and the words of the conveyance.

APPEAL from the Second Division of the Court of Session. (1) The question involved in this appeal related to the right of Mrs. Bell or Alexander, the respondent, to recover one-half of the value of a mutual gable wall from Baird, the appellant, and John Oliver, the proprietor of the immediately adjoining house. The gable in question separated the respondent's and Oliver's house. By the title-deeds of both houses the gable was declared a mutual gable. The plots of ground upon which the houses were erected formed part of a large piece of land feued to the appellant for building. Baird conveyed the ground feued by him to Murray, a builder, who erected a row of self-contained houses on plots numbered 3 to 10 inclusive. The house erected on plot 10 now belongs to the respondent. Murray built the mutual gables of the houses along the boundary line of each

(1) See *Berkeley* v. *Baird*, (1895) 22 R. 372.

plot to the extent of one-half the width upon one plot, and to the extent of the other half upon the immediately adjoining plot. The mutual gable of the house upon plot 10 was in this way erected along the boundary line between plots 10 and 11, both these plots being at the time the property of Murray. Thereafter Murray conveyed plot 10, and the house which was then built, to one Monteagle by disposition dated February 14, 1891, and by subsequent dispositions the said plot with the house thereon was transferred until it became the property of the respondent. Murray conveyed the adjoining plot, No. 11, together with the buildings to be erected thereon, including the half of the gable previously erected on plot 11, to Baird by conveyance dated July 9, 1891, and the appellant Baird feued the said plot to Oliver on April 23, 1896, and a house was built on plot 11, and for that purpose the gable was utilized. The conveyance to the respondent contained the following: All and Whole that piece of ground, ... together with the whole buildings and other erections erected or to be erected on the plot or area of ground before disponed, and all right, title, and interest, present and future, therein, "Declaring that the gable, boundary walls, parapet walls, and railings surrounding the subjects hereby disponed are mutual," with the exception of the parapet wall and railing facing Braid Road, which belongs solely to the said subjects. The missives relied on by the appellants were missives of sale dated February 4, 1891, entered into between Murray and Monteagle —that is, letters making the offer to sell and the conditions thereof, and a letter by Monteagle accepting the same. In the letter of February 4, 1891, Murray offered to sell to Monteagle "the house," and (4.) that he agreed to build up the presses and fireplaces in the south gable (the gable in question) and plaster the same. Then, by letter of same date, Murray writes: "I should have mentioned in my offer to you that the unused half of the gable and boundary walls is not included in the offer." A letter from Monteagle of the same date accepted Murray's offer.

The respondent, on December 2, 1896, raised this action against Oliver for 80*l.* as the value of one-half of the cost of

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erecting the said gable and back and front boundary walls. By the conveyance granted by Baird to Oliver, Oliver bound himself to pay the value of said one-half of the gable and boundary walls to Baird; and prior to the action being raised, Oliver had paid to Baird the sum of 44*l.* 2*s.* 2*d.* as the assessed value of the said half. Oliver lodged defences denying the respondent's claim on the ground that the gable had been erected by Murray at a time when he was owner of plot 10 and plot 11, and that he had not conveyed to the respondent's predecessor Monteagle any right to demand payment for the half of the gable erected on plot 11. On January 27, 1897, the Lord Ordinary repelled these defences. Thereafter Oliver called upon Baird, the appellant, to protect him from the respondent's claim, and Baird was made a defender in the action, and he adopted Oliver's defences, and agreed that any decree should go out against him jointly and severally with Oliver. Baird relied upon the letters of sale set out above.

On March 19, 1897, the Lord Ordinary found Baird and Oliver jointly and severally liable for the sum of 50*l.* 2*s.* 8*d.*, half the assessed value of the said gable and boundary walls; and on July 1, 1897, the Second Division of the Court of Session adhered to the Lord Ordinary's judgment. Baird then brought this appeal.

May 12. *T. Shaw*, *Q.C.*, and *J. F. McLennan* (both of the Scottish Bar), (with them *C. M. Pitman*), for the appellant. It is admitted that each proprietor has a right of property in the gable up to the central line which forms the boundary line between his ground and that of his neighbour, and that he has also a common interest in the whole gable. The fact that the proprietor of one of two adjacent areas of ground, feued for building continuous buildings, erects the whole width of a gable, does not, so long as the adjacent proprietor takes no advantage of it, render the builder proprietor of the whole gable: *Robertson* v. *Scott* (1); but he has vested in him the right to prevent the adjacent proprietor from using the gable until he has recompensed the builder for his expenditure by paying part of the cost. This right to recompense is a real right, but of a special

(1) (1886) 13 R. 1132.

kind: its existence or non-existence generally cannot be discovered from the titles, and it can only be enforced by personal action against the conterminous proprietor. The conveyance here of plot 10 and the house at most only raised the presumption that the builder intended to convey the recompense; but this presumption must yield to evidence that the builder intended to keep that recompense for himself: see *White* v. *Wear*. (1) And the letters of sale can be used here for that purpose, it being a question not of conveyance but of reckoning. The builder of the gable wrote the sale missive in that form to shew that he, being the owner also of the adjoining plot, did not want this claim of recompense to be made against himself, and that he did not intend to pass this right to his disponee of plot 10; and Baird has the same rights as Murray. When Baird sold to Oliver he took a recompense for the half gable; but it is not now payable by any one to the respondent, because, as stated, Murray had reserved it out of the sale to her predecessor in title.

[They also commented on *Glasgow Royal Infirmary* v. *Wylie* (2); *Jack* v. *Begg* (3); *Hunter* v. *Luke* (4); *Law* v. *Monteith* (5); *Rodger* v. *Russell* (6), and the similar action of *Berkeley* v. *Baird*. (7)]

A. Ure, Q.C., and *J. R. N. Macphail* (both of the Scottish Bar), for the respondent, were not called upon.

EARL OF HALSBURY L.C. It appears to me that there is no ground for this appeal. Whatever may be said about the inconvenience of allowing important rights to depend upon an undefined custom, undoubtedly the ordinary and, so far as I can see, the universal custom in Scotland is to assume, where the circumstances are such as we find in this case (indeed the learned counsel for the appellant does not deny that that is the ordinary and customary procedure), that the owner of a plot of land should have (I hesitate what phrase to use) an inchoate right to build against the adjoining house; and if he does so

(1) (Jan. 21, 1895) 2 Scots L. T. 453.
(2) (1877) 4 R. 894.
(3) (1875) 3 R. 35.
(4) (1846) 8 D. 787.
(5) (1855) 18 D. 130.
(6) (1873) 11 M. 671.
(7) 22 R. 372.

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the result is that he is bound to pay half the cost of that which is in truth a subject-matter in which each of the two persons is interested, namely, the gable wall. It would be untrue to say that either of them is vested with half of the wall, because each of them is supposed to possess, and does possess in right of accommodation and in right of support, the whole wall. Each of them possesses the whole wall for the purpose of the common occupation and the common advantage or interest which the whole wall confers upon them both.

I am not here to discuss whether it might not have been as well that such rights should be more accurately defined, and that they should not depend upon a kind of general understanding, but that each conveyance of property under such circumstances should contain a specific statement of the rights supposed to be contained in it. However, it is not for me to criticise that matter now. It has passed into the region of well-understood practice and custom in Scotland, and we have to construe the contracts before us in reference to that well-understood practice and custom in regard to which each of these parties was contracting.

Under those circumstances, while the learned counsel for the appellant admits that that is the universal practice and custom, he suggests two propositions which would take this case out of what is the admitted practice and custom. In the first place, he says that the form of the actual conveyance is one which does not contain this right. In that respect, I think what he says is true—it does not contain it; but neither is it inconsistent with it. Then he says that the correspondence—the missives, as they are called—which passed before the actual conveyance so cut down and qualified the ordinary condition of things into a condition of things in which this right to obtain half of the price of building this party wall does not exist in the present case, though generally it would exist. As to that, I can only say that apart from the question of whether or not these missives are admissible in evidence (indeed, I should have thought that if there was anything in them inconsistent with the conveyance itself they would clearly not be admissible in evidence for any such purpose), but assuming, however, that

they are admissible, it appears to me that they do not in the smallest degree give any foundation for the argument.

The two persons are contracting for the purchase of "the house." Your Lordships will observe the words "the house." The house is one. Of course, one part of the house is this wall, which is described as the "mutual" wall, and in the negotiation for the purchase it appears to have occurred to the vendor that if he described it as "the house" he would be selling that which he had no mind to part with exclusively to the vendee. Thereupon he says: "Let it be understood between us that in this bargain I am not including those parts of the house which project beyond plot 10, and which properly belong to plot 11, and though I am describing this as 'the house' which I am selling to you, let it be understood between us that by using that term I do not mean to exclude the possession of this party wall from the person who shall ultimately become the owner and proprietor of plot No. 11, because those parts of the house do project into No. 11, and would, according to the ordinary custom, become his in the same sense as that party wall is yours." It is true he does not say anything about paying for it, or making a claim—he does not deal with that subject at all. The reason for that I take to be that, at all events up to that time, the ordinary and regular understanding in Scotland was that the inevitable result of that sort of purchase and sale would be that that incident would become attached to it, and accordingly it is not dealt with. But what is dealt with (and it is very singular to my mind) is this: that although the house is sold as "the house" it is sold as plot 10, expressly excluding any part which would project into plot No. 11.

I have not to deal with what has been now established as the practice and custom in Scotland and what people understand when they make bargains there, just as the custom of a port or any other place in England may be brought in as a regular part of the contract in this country. In truth, to my mind, exactly on the same footing, the arrangements here made are subject to the well-understood course of practice and custom in Scotland. If that is so, there is nothing unlawful in the custom; and there is nothing in them which is inconsistent

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with the deed by which the property itself is passed from the one person to the other.

The proper inference to be drawn from all these things is that which the Court below did draw, namely, that this property was assigned and conveyed to the person who bought it subject to this ordinary incident. That being the state of things, there is no ground for this appeal.

LORD HERSCHELL. I am of the same opinion. I think it has been long settled as the law of Scotland that where the owner of one of several plots of land laid out for building purposes builds the gable wall of his house with the consent of the owner of the adjoining plot, one half on his own land and the other half on the adjoining land, when the owner of that adjoining plot afterwards makes use of that gable by building upon it, he becomes bound to pay to the owner of the original building one-half of the cost of that gable wall; and that this is a right which attaches not only in the case of the person who originally built the wall, but is a right which passes on a disposition of the house to the person ultimately owning it at the time when the adjoining owner builds and makes use of that party wall. That appears to have been settled more than half a century ago.

The question subsequently arose in the year 1871 whether this rule applied in the case of a house built with the gable one-half upon the adjoining projected plot, if at the time when it was built the same person owned both the plot on which the house was built and the adjoining plot. It was then settled by the Court of Session that the same rule applied, and that in that case also the owner for the time being of the house with the gable was entitled to recover, from the person who built upon that gable in connection with his house upon the adjoining plot, one-half of the cost of the gable wall.

The law so established has, I may say, not been substantially contested by the learned counsel who opened this appeal at the bar; but it was said that in the present case, although the gable wall was built half upon plot 10 and half upon plot 11, and although at the time when the adjoining owner built the present

respondent, the pursuer, was the owner of that house, and although the gable was made use of by the owner of plot 11, there is no liability on the part of any one to make compensation to the respondent, inasmuch as, it was said, all such claim was excluded by a contract made between the owner of the two plots and the original disponee of plot 10 with the house upon it, at the time, or just prior to the time, when that disposition took place.

That is the sole question which has to be determined in the present case; and in considering the documents which passed between the parties just prior to the disposition, the state of the law which I have described must be taken into account, because of course those missives must be read in the light of the law which had been at that time established and settled. I am not going to pronounce an opinion upon the question whether it is permissible to look at these missives at all. It is obviously a matter open to very considerable argument, for this reason—that the missives, in form at all events, purport to be the ascertainment of the subject-matter of the sale; and if the subject-matter of the sale as ascertained by the missives should appear to be something different from the subject-matter of the sale as ascertained by the disposition, I think it is open to a great deal of argument whether you can look at the missives at all on such a point as that, and whether you are not confined, in asking what was the thing disponed, to an examination of the disposition itself.

It does not appear to me to be necessary to express an opinion upon that point, because, looking at these missives and giving them their full effect, I can see no inconsistency between them and the disposition, nor can I find in them any such contract or bargain, even if that contract or bargain would have affected the present respondent, as the appellant's counsel have contended. It is said that the missives amounted in effect to a bargain that the recompense which ordinarily would become payable upon the owner of the adjoining plot building upon this party wall, should not in the then case be payable, and that no right to such recompense should pass to the disponee under the sale. It is not necessary to determine what would

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have been the effect of such a stipulation if made in terms. That again might have been a matter open to argument. But I cannot so read the missives. The explanation of them is, I think, that which my noble and learned friend on the Woolsack has pointed out—that the offer was an offer to sell "the house." Of course the gable wall was a part of the house—one of the walls of the house. The offer also contained an agreement to "build up the presses and fireplaces in the south gable and plaster the same," and to do certain other repairs. Taking those provisions together, it would have been well open to contention, if there had been nothing more, that the vendor offered to the purchaser the exclusive right to that gable, and therefore would have deprived himself of the power of selling the adjoining lot to any subsequent purchaser upon terms which would enable that purchaser of the adjoining lot to make use for the purposes of his house of that gable. I do not say that that would have been the construction, but at all events one can see that it might plausibly have been contended that it was so. Under these circumstances it seems to me quite natural that he should write what he did: "I should have mentioned in my offer to you of this date that the unused half of the gables and boundary walls is not included in the offer." What I have stated is, I think, an ample explanation of the language found in that letter, and it is not necessary to have recourse to such an explanation of it as is contended for on behalf of the appellant. Nor do I think that, if that which is contended for had been intended between the parties, it would have been carried out by the use of language such as is found in that letter. And when one looks at the disposition itself and finds there no reference to any such stipulation or provision, but finds there only a declaration which is quite in accordance, as it seems to me, with the missives, that the gable wall is to be "mutual," there seems to be no justification for the contention that the right which ordinarily would emerge under circumstances similar to those which exist in this case is here excluded by reason of what passed between the parties when these missives were exchanged, immediately after the original offer had been made.

For these reasons, I think the judgment appealed from ought to be affirmed.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, I concur.

LORD SHAND. I also am of the same opinion. I think it must be taken that, whether from custom or upon grounds of legal principle, the law is quite settled that, in circumstances such as here occurred, there is a claim on the part of the person who has acquired property on which he or his predecessor has built a house providing a gable for the adjoining house, to be used by the owner of the adjoining ground, there is a legal claim against that owner to payment for the use of the gable as soon as the use is taken—a payment which I suppose substantially comes to the amount of one-half of its cost. When I say "in circumstances such as these," I refer to what very commonly occurs in Scotland where a tract or block of ground is divided into plots which are sold off from time to time by a builder or other person who has laid them out for buildings, or himself erected buildings on certain of them. This law, of course, can never give any one who desires to erect a house upon his own ground a right to occupy a part of his neighbour's ground for the gable of the house which he is so erecting unless he has got the consent of that other person by specific agreement in writing or by tacit consent that it shall be so occupied.

It is to be observed that this law operates even if there be no special provision in the deeds giving expression to it. I adhere to the views stated by the Lord President (Inglis) in the case of *Glasgow Royal Infirmary* v. *Wylie* (1), a decision to which I was myself a party. But in the present case I think it is really not necessary to have recourse to the common law. I regard the provisions of this particular deed—the deed granted by Murray to Monteagle—as giving expression to that law. It is there provided that "the gable, boundary walls, parapet walls, and railings surrounding the subjects before disponed are mutual," which I think in terms expresses that the mutuality

(1) 4 R. 894.

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of the right to that gable gives a right to the person, who by himself or his predecessor has incurred the expense of erecting it, to have that expense shared when the gable comes to be used by the adjoining proprietor. It is not said that either the pursuer or any predecessor of hers in the ownership of her property has received any payment on this account, or for such use.

In that state of matters—the general rule of law and the terms of the deed alike giving the pursuer the right she claims—the only question which arises, as I view the case, is whether it can be said that under the missives, which passed between Murray the original builder and Monteagle the original purchaser from him, there was an arrangement made which deprives the pursuer of that right. If these missives had declared expressly that there should be no claim upon the adjoining proprietor for any share of the expense of the gable when that adjoining proprietor thought fit to erect a building upon it, the question would arise whether this was not equivalent to discharge or to payment in such circumstances as occurred in the case of *Robertson* v. *Scott* (1) in 1886. The decision of that case proceeds on the view that any one acquiring a property having across its boundary a part of a gable, which may be used by the conterminous owner when he comes to build, is put on his inquiry as to whether that use has been already paid for, or whether under a concluded agreement the right to that use without payment has been conferred by one in titulo to give it—and there is much to be said in favour of the reasonableness of that view. But I agree with your Lordships in thinking that there is nothing in the missives in this case which can be read as amounting to that. It may be that Murray, being a builder and not a lawyer, when he wrote the letter of February 4, in which he added to his previous offer of the property "that the unused half of the gable and boundary walls is not included in the offer," may have thought that he was thereby providing that there should be no claim for the payment when the gable came to be used in future. If that was in his mind, I can only say I am quite satisfied that it has

(1) 13 R. 1132.

not received expression so as to produce the result for which the appellant here contends. It must be observed that in the original offer what he did offer was to sell "the house No. 8, Braid Road," which was then on the property fully erected. Those words would not only have covered the house as shewn, up to the boundary of No. 10 upon the map, but would have covered the part of the gable outside of No 10. In the subsequent letter he says: [His Lordship read the letter given above]; that is to say, it is not included in the sale—it is not included as part of the subject to be conveyed. But that still leaves open the view which would at common law prevail—that the right to the gable should be mutual and should be so described in the conveyance. There is nothing like a provision to the effect that when the gable came to be used the right so to use it should be without payment, and that the disponee under the conveyance should have no claim to any such payment. If that was intended, I should think the missive should have been expressed in very different terms. I find nothing in these missives which would support the appellant's argument.

I have only to add that I agree with the views expressed by the learned judges in *Berkeley* v. *Baird* (1), which is substantially this case. I agree in the opinion of Lord Kyllachy, who originally disposed of the case, and the opinions of the learned judges of the Inner House on appeal.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 12, 1898.

Agents for appellant: *Keeping & Gloag, for John Baird, Solicitor, Edinburgh.*

Agents for respondent: *Holman, Birdwood & Co., for Mill, Bonar & Hunter, W.S., Edinburgh.*

(1) 22 R. 372.

[HOUSE OF LORDS.]

H. L. (Sc.) 1898 May 20.

THE CORPORATION OF GLASGOW . APPELLANTS;

AND

M'OMISH AND ARTHUR. . . . . RESPONDENTS.

Sewerage and Drainage—Repair of Drain—Substituting new Drain—Glasgow Police Act, 1866 (29 & 30 *Vict. c. cclxxiii.*), *ss.* 332, 335—*Glasgow Police (Amendment) Act*, 1890 (53 & 54 *Vict. c. ccxxi.*), *s.* 16—*Judicature (Scotland) Act*, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40.

In cases arising in the Sheriff Court and appealed to the Court of Session the interlocutor of the Court of Session must contain all the findings of fact; for, if a fact is not found by the interlocutor appealed against, the House of Lords must, unless the parties agree to the fact not found, remit the cause to the Court of Session to find the fact in question.

Sect. 16 of the Glasgow Police (Amendment) Act, 1890, enacts that if the drains of any house, &c., are found to be defective, the owner of the premises shall be bound, immediately on an "order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may be requisite to prevent risk to health, and, failing compliance with such order, the Police Commissioners may execute the work and recover the expense thereof as damages from the owner."

The commissioners having found that the drains of a block of houses were defective issued an order to the owners to repair the same, and, they having made default, the commissioners proceeded to execute the work themselves; but, instead of repairing the old drain, they constructed a new drain on a different site and outfall into the main sewer. In an action for the expenses, the Court of Session assoilzied the owners upon the ground that s. 16 of the Act of 1890 did not warrant the formation of a new system of drainage. This House having remitted the case to the Court of Session to find whether the Commissioners had considered that the new drainage was necessary, that Court found that part of the drainage had been considered necessary, but the rest had not:—

Held, varying the decision of the Second Division of the Court of Session, that the part considered necessary must be paid for by the owners, but not the rest.

APPEAL from the Second Division of the Court of Session, Scotland. (1)

The Glasgow Police Commissioners, the pursuers, who were

(1) Under the name of *The Glasgow Police Commissioners* v. *M'Omish and Arthur*, (1896) 23 R. 896.

represented in the appeal by the Corporation of Glasgow, the appellants, raised this action in the Sheriff Court of Lanarkshire against J. & J. M'Omish and Arthur, the respondents, for payment of the sum of 80*l.* 10*s.* 8*d.* with interest. The facts are shortly as follows: The commissioners were the public authority vested with certain statutory powers in regard to drainage of the house property in the city of Glasgow. The respondents are the factors for a tenement of houses in Glasgow, and for the purpose of this action were admitted to be in the same position as if they were the owners thereof. The tenement contains eighty-two houses of about three rooms each, and occupied by several hundred individuals. The buildings were erected about twenty-five years ago, and were drained by means of a drain running parallel with the back of the building wall at a distance of two feet from the wall. The ground above the drain was covered with a layer of asphalt which would have required to be broken up in order to enable the drains to be repaired. In 1893–94 complaints were made to the commissioners' sanitary inspector to the effect that foul gases were escaping from the tenement and that illness had occurred. Various communications took place between the inspector and the respondents, in which the former warned the latter that the drains of the houses were said to be defective so as to cause risk to health, and that the drains should be tested on a certain date. The drains were tested on April 2, 1894, and found to be defective at the places where tested, and the inspector urged the respondents to have the defective condition of the drains remedied. On April 4, 1894, the sanitary inspector issued to the respondents various notices that within or near the said premises there existed a nuisance within the meaning of the Glasgow Police Acts, 1866 to 1890, namely, that the drains in the back court and in wash-houses were very defective, also branch drains from sink-conductors and under surface and in wash-houses untrapped; likewise the whole was discharged into the Monkland Canal; and the notices pointed out that the remedy to be adopted for remedying such nuisance was a new drainage system. The respondents alleged these notices were ultra vires in that they did not call for repairs of defects of structure of the existing drains, but for

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the direction of the drainage into new channels by an entirely new and elaborate system which was quite unnecessary. The drainage did not go into the Monkland Canal, but into the main sewer. The sanitary inspector having reported the case to the commissioners, they, on September 24, 1894, issued an order ordaining the respondents to carry out all necessary operations for removing the defects of structure, or to do such acts as might be requisite to prevent risk to health, and that within seven days under certificate if they failed to comply the commissioners would execute the work, and recover the expenses as damages from them in terms of s. 16 of the Glasgow Police (Amendment) Act, 1890. The following notice, signed by the clerk to the commissioners on September 25, 1894, and embodying the said order, was served upon the respondents on September 26, 1894 :—

"53° and 54° Vict. c. ccxxi., sec. 16.

"The Glasgow Police (Amendment) Act, 1890.

"Messrs. J. & J. M'Omish & Arthur.

"By virtue and in terms of s. 16 (1) of the Glasgow Police (Amendment) Act, 1890, the Glasgow Police Commissioners hereby intimate to you that the drains connected with the houses or buildings situated at 134, 140, 146, 152, 160, and 164 Garngad Hill, Glasgow, having, after examination thereof,

(1) Sect. 16 of the Glasgow Police (Amendment) Act, 1890, was as follows, the portion printed in italics being the material part :—

"Whenever the sanitary inspector has reasonable grounds for believing that the drains connected with any house or building are defective, so as to cause risk to health, he may, after twenty-four hours, notice and (except in the case of tenement houses) with the consent of the owner and occupier of such house or building, or in the event of objection by any such owner or occupier after obtaining the warrant of a magistrate, apply the smoke or other test to such drains for the purpose of discovering the defect, and any owner or occupier who refuses to allow such tests to be made, or to give all reasonable facilities for making such tests, shall be liable to a penalty not exceeding forty shillings; *and if the drains be found defective, the owner of the premises shall be bound, immediately on an order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may be requisite to prevent risk to health, and, failing compliance with such order, the Police Commissioners may execute the work and recover the expense thereof as damages from the owner.*"

been found to be defective, so as to cause risk to health, and order you, as the owner of said houses or buildings, to carry out all necessary operations for removing defects of structure, or to do such acts as may be requisite to prevent risk to health, and that within seven days from this date, under certification that if you fail to comply with this order within the above period, the said Police Commissioners will, on the expiry thereof, execute the work, and recover the expense thereof as damages from you, all in terms of the section above-mentioned of the said Glasgow Police (Amendment) Act, 1890.

"Given at Glasgow this 25th day of September 1894 years.

"By order."

Then followed certificate of service.

The respondents took no notice of the order, and the commissioners proceeded to execute the work themselves. It was alleged that they were advised that the expense of breaking up the asphalt and repairing the defects in the existing structure would probably exceed the costs of laying a new drain in the soft soil sixteen feet further from the back wall of the building; they accordingly proceeded to have a new drain made, the respondents being cognisant of what was being done, and making no objection. The expense of laying the entire drain and connecting it with the main sewer amounted to 80*l.* 10*s.* 8*d.*, the amount sued for. Of that sum 16*l.* 5*s.* was expended in connecting the sink-conductors inside the houses with the drains. The respondents alleged that there were no water-closets in the houses; that there were privies in the back court; that the drainage from the property consisted only of roof water, gravitation water from the sinks and from the washing-tubs in six wash-houses; that the drain was carried round the west gable of the houses till it met the public sewer into which it discharged; and that no portion of the drainage, as was at one time thought, entered the Monkland Canal. They further alleged that the new system was suitable for a system of water-closet drainage, and ran parallel with the old one, and entered into the same public sewer, although it ought to have been known that a sufficient outflow drain already existed in the old drain; that what ought to have been done to remedy

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defects of structure was to make the joints of the old drain tight, and not to discard the whole existing system; and that this was all that was authorized by s. 16 of the Glasgow Police (Amendment) Act, 1890. After a proof, the Sheriff-Substitute (Spens) on March 14, 1896, pronounced the following interlocutor: "Finds that the sanitary inspector for the city of Glasgow had, on or about March, 1894, reasonable grounds for believing that the drains connected with the houses or buildings at Garngad Hill, specified in art. 2 of the Condescendence, of which defenders were factors, were defective: Finds that he gave notice to defenders on 16th March, having in view the 16th section of the Glasgow Police Act, 1890, that the sufficiency of said drains would be tested on 2nd April, 1894: Finds on the said 2nd April the smoke-test was applied to the drains in said tenement, with the result of indicating the drains were defective, and finds in point of fact said drains were defective: Finds that certain procedure thereafter went on, but finally, on 24th September, the pursuers, the Glasgow Police Commissioners, issued an order under the 16th section of the statute above referred to, ordaining the defenders to carry out all necessary operations for removing defects of structure, or to do such acts as might be requisite to prevent risk to health, and that within seven days, under certification that if they failed to comply with said order within said period the pursuers would execute the work at the expense of the defenders: Finds nothing was done by defenders, and the sanitary inspector, on or about 17th October, 1894, ordered the witness John Shaw to proceed with the work, which the sanitary authorities specified as in their opinion necessary to put the drainage right: Finds the charge for the work done in connection with the premises by the said John Shaw amounted in cumulo to the sum of 80*l.* 10*s.* 8*d.*, being the amount of the account sued on: Finds, under reference to note, the defenders are liable for said expenditure by pursuers; therefore repels the defences, and decerns as libelled: Finds defenders liable in expenses: Allows an account thereof to be given in, and remits the same, when lodged, to the auditor to tax and report."

On appeal to the Second Division of the Court of Session

that Court on June 26, 1896, found as follows: "Find that the pursuers having reason to believe that the drains connected with the defenders' property were defective, by notice dated 25th September, 1894, issued by virtue and in terms of s. 16 of the Glasgow Police (Amendment) Act, 1890, gave notice of this to the defenders, requiring and ordering them 'to carry out all necessary operations for removing defects of structure, or to do such acts as may be requisite to prevent risk to health': Find that the defenders did nothing to the drains of their property in response to this order, and that the pursuers proceeded to put the drains in question into what they considered a proper and safe condition: Find, however, that the pursuers did not proceed to remedy or remove defects of structure in the then existing drains, but, disregarding the existing structure altogether, laid down an entirely new drain in a different site and with a different outflow: Find that the pursuers' proceedings were not authorized by said s. 16 of the Glasgow Police (Amendment) Act, 1890: Therefore recal the interlocutor appealed against: Sustain the appeal: Assoilzie the defenders from the conclusions of the action: Find the defenders entitled to expenses in the inferior court and in this Court, and remit the accounts of said expenses, when lodged, to the auditor to tax and report; and decern."

As stated below, an order of this House dated July 8, 1897, directed finding in fact to be made upon the following: "Whether the drainage works executed by the pursuers" (the Glasgow Police Commissioners), "or any, and, if so, what part of the said works were requisite, in the opinion of the pursuers, or in fact?"

On December 1, 1897, the Second Division of the Court of Session pronounced the following findings in fact upon the questions remitted to them:—

"The Lords having heard counsel and reconsidered the cause in conformity with the remit from the House of Lords dated 8th July, 1897—Find, as matter of fact—(1.) That the work charged for in the account sued on, so far as it relates to the sink-conductors, was, in the opinion of the pursuers, and in fact, necessary; (2.) that, quoad ultra, the work charged for in

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said account was not in fact necessary; (3.) that, as regards the work last mentioned—(*a*) that it was not proved that the pursuers were of opinion that it was necessary, and (*b*) that it is proved that the investigation and inquiries made by the pursuers did not warrant the opinion that said work was necessary, or afforded reasonable ground for thinking that it was so."

1897. July 6. *Balfour, Q.C.* (with him *Lees*, both of the Scottish Bar), for the appellants. The commissioners did not act beyond their powers. If the narrow construction put upon the Act of 1890 by the Second Division of the Court of Session is affirmed, the beneficial operation of s. 16 will be greatly restricted and the public health of Glasgow imperilled.

[LORD WATSON. The interlocutor is defective in that it does not find that the laying down of the drains was in the opinion of the commissioners necessary.]

As this action was commenced in the Sheriff Court, if there is an important fact not found the only course is for the parties to agree as to that fact, or to send the cause back for the Court of Session to find it: Judicature (Scotland) Act, 1825 (6 Geo. 4, c. 120), s. 40; *Little* v. *Stevenson & Co.* (1); *Caird* v. *Sime.* (2) [See also *Gilroy, Sons & Co.* v. *Price & Co.* (3) and *M'Lean* v. *Clydesdale Banking Co.* (4)]

Macmorran, Q.C. (with him *Ure, Q.C.*, of the Scottish Bar), for the respondents. The interlocutor appealed from clearly finds that some portion of the works were not necessary.

[LORD HALSBURY L.C. The House cannot give judgment as to one point; the cause must be remitted in order that the learned judges of the Second Division may pronounce further findings in fact.]

See the questions remitted above.

1898. May 20. The Court of Session having on December 1, 1897, reconsidered the cause and found as above.

Balfour, Q.C., for the appellants. The sink-connections to the drain, costing 16*l.* 5*s.*, have been found to have been neces-

(1) [1896] A. C. 108.
(2) (1887) 12 App. Cas. 326.
(3) [1893] A. C. 56, 60.
(4) (1883) 9 App. Cas. 95, 112.

sary in the opinion of the commissioners, and the appellants now ask for judgment at least on that point.

Further, the interlocutor of June 26, 1896, cannot stand with the interlocutor of December 1, 1897. The first ought to be recalled as unnecessary and embarrassing, because the reasons given on pronouncing that interlocutor appeared to lay down that nothing but the power to repair is given to the appellants by the Act of 1890.

[LORD WATSON. The word "repair" may cover renewal.]

If the interlocutor of June 26, 1896, stands, it may be said that this House expressed an opinion that the defenders were only liable for the expenses of repairs.

[EARL OF HALSBURY L.C. This case cannot be cited against you on the point you fear, as it does not arise.]

Macmorran, Q.C., for the respondents, was asked to confine his argument to the question of the sink-conductors. Although the sink-conductors were part of the work, they were not included in the notice. The existence of defects in the joints of these pipes was not known or suspected by any one until after the completion of the main works. On testing the works the appellants for the first time discovered these defects. They gave no notice or other information to the respondents concerning them. The notice had reference to the drains along the back of the houses, and the sink drains were inside the houses.

[LORD SHAND. They connected with the drains, and are, therefore, within the notice.]

Balfour, Q.C., in reply. The definition in s. 3 of the Glasgow Police (Amendment) Act of 1890 of "drains" include "soil-pipes, waste-pipes, drain-conductors, traps, and all connections required in any drainage system in a house or other building."

May 20. Judgment on remit.

EARL OF HALSBURY L.C. In this case it appears to me that the findings of fact which are found and ascertained render it impossible to argue this question any longer, except in respect of one small amount. It appears to me beyond all doubt that the commissioners were within their right in giving notice to repair, and that that notice ought to have been attended to,

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and the defects which undoubtedly did exist in some parts of the drainage ought to have been repaired. But instead of doing this the owners of these houses thought fit to refuse to do anything. The result was that the commissioners had to intervene in the cause of the public health. They intervened in a manner which, as it appears to me, they had no authority to do, because they did a great deal more than was necessary—more than those who were acting for them really thought was necessary; and in respect of their having done so much as that they are not entitled to recover under the circumstances of this case. On the other hand, they have incurred expenses in doing that which was required and what was to my mind perfectly well included in the notice. Apart from the interpretation clause to which Mr. Balfour has called our attention, I should have understood this notice as comprehending everything which is in the popular sense part of the drains of the house. It is new to me to be told that what are called here "sink-conductors"—that is to say, pipes by which the drainage is brought into the drains of the house—are not part of "the drainage system." In that respect it appears to me that it is clear that the pursuers were entitled to a decree for 16*l.* 5*s.*, which appears to be the undisputed amount which they have expended upon the various works they have executed within the limits of their authority, and which ought to have been executed by the defender.

The only question which remains is the question of how the costs are to be dealt with here. On the one hand, the pursuers sued for 80*l.*, and they have been found entitled to only 16*l.* 5*s.* On the other hand, the defenders, instead of doing what they were bound to do, chose to do nothing, although they were aware that they were under an obligation to take proper precautions and to make repairs that were requisite with regard to the public health. The result, as it appears to me, is that there ought to be a decree for 16*l.* 5*s.* in favour of the pursuers, and that neither party is entitled to have any costs at all either here or in the Court below. I move your Lordships accordingly.

LORD WATSON. I entirely concur in the judgment which has been moved by the Lord Chancellor both as to the merits or demerits of the case, and as to costs.

LORD HERSCHELL. I am of the same opinion.

LORD SHAND. I also concur.

Ordered, that the interlocutor of June 26, 1896, *be varied by omitting the following words, namely* ("*Therefore recall the interlocutor appealed against; sustain the appeal; assoilzie the defenders from the conclusions of the action; find the defenders entitled to expenses in the inferior Court and in this Court; and remit the accounts of said expenses; when lodged, to the auditor to tax and report, and decern*"), *and in lieu thereof, it is declared and adjudged that the appellants* (*pursuers*) *are entitled to a decree against the respondents* (*defenders*) *for payment of the sum of* 16*l.* 5*s.: And it is ordered that each party bear their own costs both here and in the Courts below.*

Agents for appellants: *Martin & Leslie, for Campbell & Smith, S.S.C., Edinburgh.*

Agents for respondents: *Wild & Wild, for Simpson & Marwick, W.S., Edinburgh.*

[PRIVY COUNCIL.]

J. C.*
1898
March 8.

SOUTHLAND FROZEN MEAT AND PRODUCE EXPORT COMPANY, LIMITED } Plaintiffs;

AND

NELSON BROTHERS, LIMITED . . . Defendants.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW ZEALAND.

Contract—Construction—Use.

The respondents contracted with the appellants not to "erect or assist, or be in any way concerned or interested in the erection of or use of freezing works at Bluff," and thereafter contracted with W. first to purchase all frozen meat produced at his works at Bluff, and secondly to purchase his works at the expiration of their contract with the appellants, together with additional works to be completed by that date:—

Held, that neither of these contracts with W. was a breach of the contract with the appellants, by the true construction whereof use means the manufacturing use, and does not include the uses contemplated by the respondents in either of their purchases.

Appeal from a decree of the Court of Appeal of New Zealand (Oct. 12, 1896) directing judgment to be entered for the respondents.

The facts are stated in the judgment of their Lordships.

Sir R. Reid, Q.C., *Mattinson, Q.C.*, and *Acland*, for the appellants.

Cohen, Q.C., and *Wood Hill*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

Lord Herschell. In this case the appellants brought their action to recover damages in respect of the alleged breaches of an agreement which they entered into on June 26, 1891, with the respondents. They allege that there have been two breaches

* *Present:* The Lord Chancellor, Lord Herschell, Lord Macnaghten, Lord Morris, and Sir Richard Couch.

of the 8th clause of that agreement. The agreement, speaking generally, was an agreement by which the respondents were to purchase all the output of the appellants' freezing works at Bluff. There are only two clauses to which it is necessary to call any special attention, the one which gives rise to the complaint and the one which precedes it. The 7th clause provides, "That in the event of Nelson Brothers, Limited, during the said term of three years," which was the term during which this contract was to operate, "making a contract for a period of one year or more with any company, body, or person carrying on within New Zealand the business of freezing for owners or growers of stock, by which higher f. o. b. prices or better terms than those named herein shall be offered or given by Nelson Brothers, Limited, then Nelson Brothers, Limited, shall either give the same terms to the company"—that is the appellants—"or, in the event of their declining to do so, shall allow the company, if it so desires, to terminate this agreement on the company giving one month's notice." The 8th clause is as follows: "That Nelson Brothers, Limited, shall not during the said term of three years erect or assist, or be in any way concerned or interested in the erection or use of freezing works on land or water at the Bluff, or within the limits of the Southland or Wallace Counties, without making special arrangements with the company, nor do anything of the like nature which may in any way interfere with or restrict the output, business, trade or profits of the company." Now, the first breach alleged is that during the currency of the three years Nelson Brothers, Limited, the respondents, entered into a contract with a Mr. Ward, who had erected freezing works in the neighbourhood of Bluff, by which they agreed on certain terms to take the whole of the output of his freezing works. There can be no doubt that such an agreement is within the provisions of s. 7, and that the appellants were entitled to insist upon getting the same terms as Mr. Ward, and, if they were refused such terms, could have terminated their agreement by giving a month's notice; but it is said that s. 8 was broken by the agreement entered into with Mr. Ward, and that, although that agreement was within the general terms of s. 7,

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yet nevertheless s. 8 takes it out of the general terms of s. 7 and extends to it a more stringent provision.

Now, the question turns upon the meaning of the words "erect or assist, or be in any way concerned or interested in the erection or use of freezing works at Bluff." Was the purchase under an agreement by which they were to take all the frozen meat produced at Ward's works within any of these words? It certainly was not an erecting or assisting in the erection; but it is said that it was an assisting, or being concerned or interested in the use of the works. Their Lordships agree with the Court below that it is not quite certain that the word "assist" is intended to apply to the word "use," and may not be limited to the word "erection," but their Lordships do not dwell upon that. They assume, for the purposes of the argument, that the word "assist" governs the word "use" as well as the word "erection." It seems to their Lordships that this agreement, especially in connection with clause 7, which has just been read, and which throws light upon it, must be construed in a business fashion, and that the words must not be applied to everything that might be said to come within a possible dictionary use of them, but must be interpreted in the way in which business men would interpret them, when used in relation to a business matter of this description.

It seems to their Lordships that the first matter dealt with and prohibited is the erecting or assisting in the erection; but then it was not enough to prohibit the erecting or assisting in the erection, because somebody else might erect and complete the works, and the same prejudice would follow, whether they used the works which they themselves erected, or used the works which somebody else had erected. Therefore it is also directed against the being interested, or concerned, or assisting in the use. Now, "the use" seems to their Lordships to mean the manufacturing use—the use as works for the freezing business which was carried on there. That is, in the opinion of their Lordships, the business sense of "use" as found in this clause in connection with the words "freezing works" and the word "erection." Now, if that be the true meaning, it seems perfectly clear that a contract to buy all the produce of the works is not

in any reasonable sense either an assisting in the use of the works, or being interested or concerned in the use of the works. If that conclusion be arrived at, it seems equally to settle the question whether the latter part of the clause assists the appellants, whereby the respondents undertake not to do anything of the like nature which may interfere with or restrict the output or profits or business of the appellants. When the nature of the earlier part of the clause and what is there prohibited has been ascertained, and when the conclusion has been arrived at that its nature is such as has been indicated, then it seems that this agreement, to take all the output of Ward's freezing works, or the acting upon it, is not doing anything of the like nature with that which is prohibited in the earlier part of the clause.

The other breach alleged is this: It is said that in May, 1893, some months prior to the termination of the three years, an agreement was entered into by which the respondents were to become the purchasers of Ward's works at the commencement of the year after the three years had terminated. Certainly an agreement for the purchase of the works at that date could not of itself be said to be an erecting or an assisting, or being in any way concerned or interested in their erection or use. It is not pretended that unless buying the output was an assisting or being concerned in the use, the respondents were concerned in any other way; but it is said that in the agreement it was stipulated that by the time when the sale was to be completed certain ancillary or additional works were to be completed also, so as to make the works completely satisfactory; and the suggestion is that although the agreement itself, if it had been an agreement for completed works, might not have been a breach of the 8th article, yet that inasmuch as the agreement provided for the erection of a boiler-house and certain cottages that constitutes a breach. Their Lordships are unable to adopt that view. It does not seem to them that, giving full effect to the argument, it can possibly be said that by reason of that agreement being entered into the respondents assisted, or were in any way concerned or interested in the erection of the freezing works at Bluff.

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One other point is made. On November 7, 1893, less than two months before the three years expired, Mr. Ward appears to have been pressed for money. He asked Messrs. Nelson Brothers, the respondents, to let him have a loan, not in the least in connection with the expenditure of money upon the freezing works. There is no evidence that any of it was spent or intended to be spent in that way. They gave him a bill at two months' sight, which would be due in January. How can it be said that a loan so made, for which no doubt they had the security of the agreement that they had entered into, which was to take effect on January 1, was an erecting or assisting, or being in any way concerned or interested in the erection or use of the freezing works? Their Lordships are unable to think that this question can be answered in any way but one, namely, that it was not a breach of that stipulation.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must pay the costs.

Solicitors for appellants: *Mackrell, Matson, Godlee & Quincey.*
Solicitors for respondents: *Dawes & Sons.*

[PRIVY COUNCIL.]

JOHNSTON AND THE TORONTO TYPE FOUNDRY COMPANY, LIMITED . } PLAINTIFFS;

AND

CONSUMERS' GAS COMPANY OF TORONTO . . . . . } DEFENDANTS.

J. C.*
1898
March 22;
April 1.

ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO.

Statutory Duties of a Corporation—Breach—Cause of Action.

Where by an Act extending the powers of the respondent company certain duties and obligations were imposed on it for the benefit of its customers with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default and no right of action given to persons aggrieved, provision however being made for its accounts being audited by direction of the mayor of the corporation with whose assent the company was originally established:—

Held, that no individual customer had a right of action against the company for non-compliance with the provisions of the Act. Such a right only arises where given by the Act, and especially so where the Act as in this case is in the nature of a private legislative bargain, and not one of public and general policy.

APPEAL from a decree of the Court of Appeal for the Province of Ontario (June 30, 1896) reversing a decree of Ferguson J. (Sept. 9, 1895), and dismissing the action with costs.

That action was brought to compel the respondents to refund the amount of certain alleged overcharges for gas supplied by them and to fulfil certain statutory obligations. The appellants alleged that they were consumers of gas furnished by the respondents, the Consumers' Gas Company, and prayed for a mandatory order directing the respondents to comply with certain provisions of an Act passed by the Ontario Legislature in 1887 intituled "An Act to further extend the Powers of the Consumers' Gas Company of Toronto" (50 Vict. c. 85),

* *Present:* THE LORD CHANCELLOR, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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which the appellants alleged had not been complied with, but had been disregarded by the respondents in that, amongst other matters, they had not formed a reserve fund, permitted by the 4th section of the Act, and had not invested the moneys which had been placed to the credit of that fund in some one or more of the securities in the said 4th section mentioned; also for an order to compel the company to create and maintain a certain account called "The Plant and Buildings Renewal Account," provided for in the 6th section of the Act, and to direct them to enter all their surplus profits from the time they first accrued, together with interest on the reserve fund, in a "Special Surplus Account," also mentioned therein; and for a declaration that the plaintiffs were entitled to a reduction in the price of gas as and from such time as the profits on the reserve fund should shew them to be so entitled under the provisions of the Act; and for other purposes.

The appellants alleged that they had been large consumers of gas since the passing of the Act above referred to, and that they had paid large sums of money to the respondent company for the gas supplied to them by the respondents, and they claimed to sue on behalf of themselves and all other consumers of gas in the city of Toronto; but they did not allege that they made any of the payments under protest or otherwise than voluntarily.

The appellants further alleged that prior to bringing their action they had requested the respondents to comply with the provisions of the above-mentioned Act, and had asked for an account and had demanded the repayment of the money which they alleged they had overpaid to them. And they charged that the respondent company had refused, and still refuse, to comply with the provisions of the said statute, or to account and repay to the appellants the money they claim to have overpaid them.

The respondents pleaded, denying the allegations contained in the statement of claim, and also demurred thereto, alleging as grounds of demurrer that the appellants shewed no cause of action or title to the relief claimed by them, and that they had no locus standi or right to bring the action against the

respondents, and that they did not represent and could not sue on behalf of that portion of the public interested in the matters in question.

A special case was stated, and the facts are stated in the judgment of their Lordships.

Ferguson J. held that the appellants had a right to sue; and that the respondents had neglected and were generally bound to comply with the provisions of the Act. He directed an account.

Maclennan J.A., on appeal, held that under the Acts prior to 1887 the respondents were free to supply or refuse gas to a customer as they pleased, and to charge what they pleased. Under the Act of 1887, "the company can still choose its consumers, and is still under no obligation to sell to any particular person, unless it chooses to do so. The Act has not made it compulsory to sell gas to everyone, nor is anyone compelled to buy from them. It follows that the consumers who are mentioned in the Act are those persons to whom the company thinks fit to sell, and who are willing to agree to buy from them. In other words, the consumers' relation to the company is still one of contract, and there is nothing to prevent the latter from terminating any particular contract just as they could before the Act. What, then, is the effect of this provision of the Act for a reduction of price? I think it is no more than this: that in every case in which the company chooses to continue to supply gas to a person who had been a consumer in the previous year, this provision of the statute as to a reduction of price must be read into the contract." He further said: "The plaintiffs' cause of action appears to be that, having regard to the statute, they have paid more than they ought to have paid for the gas which they have received from the defendants for a number of years past, and they seek to recover back what they have overpaid. The action to recover back money paid is a very familiar one. It is the old common law money count of 'money had and received,' and I think, notwithstanding its great length, that is the only cause of action alleged in the statement of claim. If the plaintiffs are entitled to recover back any part of the money which they have paid to the

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defendants for gas, they have a cause of action; if not, they have none. Unless they have paid money under circumstances which entitle them to recover it back, their action ought to be dismissed, and they have no concern with the way the defendants have kept their accounts, or the application they have made of their premiums and earnings. If the plaintiffs have had the benefit of a reduction in the price of gas, that is all they are entitled to; and if they have not, yet the moment they receive it they are entitled to nothing further; they have no longer any interest in the accounts. They have then no more right to question the company's conduct of its business, or its manner of keeping its accounts, than any stranger." He found as a fact that there had been no overpayment.

Haldane, Q.C., and *Houston*, for the appellants, contended that they as customers of the gas company were entitled to the statutory reduction in the price of gas whenever the statutory conditions upon the happening of which such reduction became obligatory on the company have been fulfilled. They were in consequence entitled to have the company's funds applied and the accounts kept as directed by the statute in order that the conditions might be fulfilled and their fulfilment made manifest. The violation of these rights constituted a wrong for which they could sue. The Attorney-General is not a necessary party to an action to enforce a statute unless the acts required to be done are of a public nature, or unless all the Queen's subjects are damnified alike. Here the consumers of the respondents' gas are a class by themselves who suffer injury, and the Act is one of the nature of a private legislative bargain. In *Mayor of Devonport* v. *Plymouth, &c., District Tramways Co.* (1) it was held that where an Act contains a provision for the special protection or benefit of an individual, he may enforce his rights thereunder without either joining the Attorney-General or shewing special or particular damage. All that was decided by *Atkinson* v. *Newcastle, &c., Waterworks* (2) was that the mere imposition of a statutory duty on a corporation did not necessarily render it liable to individuals damnified by omission

(1) (1884) 52 L. T. (N.S.) 161, 164. (2) (1877) 2 Ex. D. 441.

to observe it. Lord Cairns pointed out in that case that the irresistible conclusion from the particular Act in question, namely, 10 Vict. c. 17, s. 43, was that the Legislature did not intend to give any right of action to an individual. Here the statutory obligations imposed were for the benefit of all consumers of the respondents' gas. The appellants had a direct pecuniary interest in the respondents' fulfilment of those obligations, and therefore had a right of action under this Act.

M'Carthy, Q.C., and *A. J. Ram*, for the respondents, were not heard.

1898
April 1.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The respondents, the Consumers' Gas Company of Toronto, were incorporated in 1848 by an Act of the Parliament of Canada (11 Vict. c. 14). The preamble of the Act stated that the great and increasing extent of the city of Toronto, and the great demand for a cheap and effective mode of lighting the streets and places of the city as well as the houses, shops, and other buildings therein, rendered it desirable that more than one company should be established for the purpose of furnishing a further supply of gas for lighting the city. It also stated that the corporation of Toronto had signified their assent to the establishment of the company, and to their having the necessary powers connected with the establishment and construction of the necessary works.

The appellants, who were plaintiffs in the action, complained that they had been overcharged by the company for gas consumed in the business of the Toronto Type Foundry Company, Limited. The appellant Johnston is the managing director of the Type Foundry Company and the person with whom the contract for the supply of gas was made. The plaintiffs sued on behalf of themselves and all other consumers of gas furnished by the Consumers' Gas Company. They did not name or indicate any particular sum as the amount of overcharge, nor did they suggest that they had paid more than they had contracted to pay. Their case was that the gas company had violated or neglected obligations imposed upon the company by an Act passed in 1887, and intituled, "An Act to further extend

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the powers of the Consumers' Gas Company of Toronto." They alleged that if those obligations had been fulfilled some reduction would have been made in the price of the company's gas. They insisted that the company's accounts from the date of the Act of 1887 should be reviewed and recast by the Chancery Division of the High Court of Justice. And they claimed that the gas company should be declared to be trustees for them of all sums found to have been misapplied by the company and which ought to have been allowed to the plaintiffs in reduction of the price of gas.

The gas company demurred generally, but the demurrer was ordered to stand over to the trial. In the meantime the parties agreed upon a special case, setting forth a number of figures, which however were not to be binding on either party in case the Court should think fit to direct a reference. On the special case and the pleadings the Court was asked to determine, in the first place, whether the plaintiffs or either of them had a right to maintain the action. In the event of that question being answered in the affirmative, a variety of points were suggested for the consideration of the Court in relation to the company's accounts and the conduct of its affairs.

The trial judge held the plaintiffs entitled to relief. He thought the suit properly constituted. He pronounced an elaborate decree containing ten declarations on the points suggested by the special case, and directing no less than fifteen separate accounts with the view of ascertaining the true position of the company, having regard to the requirements of the Act of 1887. The accounts to be taken would, he said, "necessarily be accounts comprehending the whole business of the defendants done since the passing of that Act, including the surplus profits in the hands of the defendants at the time that Act was passed."

The gas company appealed to the Court of Appeal for Ontario. The appeal was allowed, and the action was dismissed with costs. From that decision the present appeal has been brought.

It was admitted at the bar, very properly, that the plaintiffs were not entitled to sue on behalf of other consumers of gas

furnished by the gas company, and that the action must be treated as brought by them in their individual capacity.

The only question argued was whether the Court of Appeal for Ontario were right in holding that the plaintiffs had no cause of action. The answer to that question must depend solely on the Act of 1887. It was not suggested that the action could be maintained on any other ground.

There is no dispute as to the circumstances under which the Act of 1887 was passed. The capital of the company had been increased under the authority of various enactments. It stood at the time at $1,000,000. The dividends had reached the statutory limit of 10 per cent., and the shares were at a premium. The gas company applied to Parliament asking that the capital might be doubled. They proposed that the additional $1,000,000 should be allotted to the existing shareholders at par. The corporation of Toronto opposed the bill on the ground that the shareholders were not entitled to so large a bonus. They insisted that advantage should be taken of the opportunity to secure a reduction in the price of gas. Negotiations then took place between the gas company and the corporation, and the Act as passed was the result of a compromise.

It is not necessary to state the provisions of the Act in any detail. Whatever the facts may be, their Lordships assume for the purposes of this case that the company has not fulfilled its statutory obligations.

The Act authorized the company to increase the capital to a sum not exceeding $2,000,000. All new shares were to be sold by auction. All sums received on sales over the par value were to be added to the reserve fund until it equalled one-half of the paid-up capital. The reserve fund was not to exceed that limit, and it was to be drawn upon only for certain purposes specified in the Act. Another fund was to be created and maintained by the company, to be called the "Plant and Buildings Renewal Fund." To it were to be charged "all usual and ordinary renewals and repairs." The Act then goes on to provide that any surplus of net profit from any source whatever, after the payments therein mentioned, and the establishment and maintenance of the reserve fund and the Plant and Buildings

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Renewal Fund, shall be carried to a special account to be known as the "Special Surplus Account," and it declares that "whenever the amount of such surplus is equal to 5 cents per thousand cubic feet on the quantity of gas sold during the preceding year, the price of gas shall be reduced for the then current year at least 5 cents per thousand cubic feet to all consumers."

After these provisions there comes a clause which seems to their Lordships to have an important bearing on the question before them. It is in the following terms:—

"9. The company shall give not less than two weeks' written notice by registered letter to the mayor of the city of Toronto for the time being of the time of commencing the annual audit of the books and accounts of the company, and it shall and may be lawful for an auditor to be appointed by the mayor of the corporation of the city of Toronto, should he deem it advisable to make such appointment, to be present at such annual audit, and for the purpose of verifying the company's annual statement to have access at the company's office to all books, accounts, and papers necessary for such purpose."

It cannot, of course, be disputed that the gas company is under an imperative obligation to create and maintain the several funds specified in the Act of 1887 in accordance with the directions of the enactment. Nor is it open to doubt that the machinery of the Act was designed for the benefit of all the company's customers. At the same time it is to be observed that no pecuniary penalty is imposed for default, nor is a right of action expressly and in terms given to persons aggrieved. Now it is perfectly true, as was observed by Lord Tenterden, that if a statutory "obligation is created, but no mode of enforcing its performance is ordained, the common law may in general find a mode suited to the particular nature of the case": *Doe* d. *Bishop of Rochester* v. *Bridges*. (1) But it is equally true that the question whether an individual who is one of a class for whose benefit such an obligation is imposed can enforce performance by an action at law must depend, to use Lord Cairns's words, "on the purview of the Legislature in the

(1) (1831) 1 B. & Ad. 847, 859.

particular statute and the language which they have there employed": *Atkinson* v. *Newcastle Waterworks Co.* (1) It is especially so, as his Lordship observes, when the Act in question is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers incorporated for purposes which Parliament considers of public or general utility.

We know the history of this legislation. It is difficult to suppose that the gas company would wittingly have consented to place themselves at the mercy of every customer who might fancy he was paying more than the company was entitled to charge. On the other hand, a Chancery suit involving all necessary and proper accounts and inquiries is at best not a handy mode of obtaining redress for a trifling overcharge in a gas bill. Some people might think the cure worse than the disease. At any rate, it may be doubted whether a remedy which is commonly supposed to be neither expeditious nor economical would have commended itself to Parliament as the best way of protecting ordinary householders and ordinary shopkeepers from the rapacity of a wealthy and powerful company.

What, then, was the intention of the Legislature? What security was provided to ensure observance of the statutory requirements? The answer is to be found in s. 9. The gas company was originally established with the assent of the corporation. The corporation were large customers, if not the largest customers, of the company. The ratepayers, therefore, were interested in keeping down the price of gas. On behalf of their constituents, and on behalf of the public, the corporation came forward to oppose the bill of 1887. They procured the insertion of clauses designed to cheapen the supply of gas. They obtained authority to check the company's accounts. They were given the fullest power of investigation. If they should find the company wilfully disobeying the Act of Parliament they certainly would have no difficulty in compelling obedience by process of law. To them, and not to every individual customer who may

(1) 2 Ex. D. 441, 448.

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fancy himself aggrieved, Parliament has confided the duty of seeing that the Act is obeyed.

There seems to be no reason to suppose that the corporation have neglected the duty which they voluntarily undertook. It appears by the company's balance-sheets annexed to the special case that in every year, except the year immediately preceding the commencement of the action, the corporation appointed an auditor who examined, verified, and signed the accounts. The accounts for 1893 are not signed by an auditor on behalf of the city. No explanation is given of the omission. It may be that the corporation thought it unnecessary to examine the accounts for that year, or they may have considered it not desirable, as it certainly was not required by the Act, that their officer should give his formal sanction to the company's accounts. However that may be, whether the corporation have or have not been remiss, it seems to their Lordships to be perfectly plain that no individual customer can have a right of action against the company for non-compliance with the provisions of the Act of 1887. The present action is entirely misconceived.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellants will pay the cost of the appeal.

Solicitor for appellants: *H. Percy Becker.*
Solicitors for respondents: *Harrison & Powell.*

[PRIVY COUNCIL.]

MUNICIPAL COUNCIL OF SYDNEY . . PLAINTIFFS; J. C.*
1898
AND
YOUNG . . . . . DEFENDANT. March 10.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Public Works Act, 1888—*Sydney Corporation Act of* 1879—*Construction—Vesting—Diverting a Street into a Tramway not a taking of Property for Public Purposes.*

Held, that diverting a street into a tramway is not a taking of property within the meaning of the New South Wales Public Works Act:

Held, further, that the Sydney Corporation Act of 1879, which vests public ways in the municipal council, does not so vest them in proprietary right, which alone gives claim for compensation, but only for purposes incidental to the exercise of municipal authority.

APPEAL from an order of the Supreme Court (March 4, 1897) directing a verdict to be entered for the respondent (the Secretary for Public Works) in an action brought by the appellants for a mandamus to proceed on a claim for compensation for land lately forming part of a public street in the city of Sydney, which had been resumed under the provisions of the "King to Ocean Street Cable Tramway Act of 1892" and the Public Works Act of 1888 for the purposes of a cable tramway.

The Act of 1892 above mentioned, which incorporated Part III. of the Act of 1888 relating to compensation, authorized the construction of a public cable tramway from King Street to Ocean Street. The respondent, as the "constructing authority" under those Acts, appropriated a piece of land 12 perches in area, forming part of Clement Street, which at the time was a public way in the city of Sydney, within s. 67 of 43 Vict. No. 3, which is set out in their Lordships' judgment.

The appellants claimed 990*l.* compensation, and the respondent resisted the claim, contending that on resumption the

* *Present:* THE LORD CHANCELLOR, LORD HERSCHELL, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

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piece of land ceased to form part of a public way or street, and all right and interest of the council therein ipso facto ceased.

A special case was stated by consent, the first question raised being whether the council was entitled to compensation by reason of the resumption.

Witt, Q.C., and *Poley*, for the appellants, contended that they were entitled to compensation under s. 30 of the Public Works Act, 51 Vict. No. 37, Part II. ss. 19, 21, Part III. ss. 31, 34, 36, 38, which are almost identical with the Imperial Lands Clauses Act, as parties interested in the land taken as required for the tramway in question: see 8 & 9 Vict. c. 18, ss. 6, 7, 19. They referred to 43 Vict. No. 3, s. 67, and the amending Act, 48 Vict. c. 5, s. 1, sub-s. 3, to shew that they possessed property in the street such as to entitle them to compensation. Moreover, they had a property in the materials placed upon the street as distinct from property in the street, which materials were severable therefrom and were chattels of monetary value.

[Reference was made to *Mayor of Tunbridge Wells* v. *Baird* (1); *Rolls* v. *Vestry of St. George* (2); *Mayor of Birkenhead* v. *London and North Western Ry. Co.* (3)]

Sir R. Reid, Q.C., and *Vaughan Hawkins*, for the respondent, were not heard.

The judgment of their Lordships was delivered by

LORD MORRIS. In this case their Lordships feel no difficulty. A local Act (51 Vict. No. 37) enabled the Secretary for Public Works of Sydney, who is called the constructing authority, to form a tramway. It became necessary in the making of the tramway to take some 12 perches of a street leading from a particular named place to a public park. The municipal authority of Sydney alleged that by the taking of those 12 perches of this street they were entitled to compensation under the Act, which of course entitles the owner of the property to compensation. That of course depends on whether the municipal authority of Sydney are the owners of the street in any sense

(1) [1896] A. C. 434, 437. (2) (1880) 14 Ch. D. 785.
(3) (1885) 15 Q. B. D. 572.

that would give them a claim for compensation. The provision by which the property in the street in any respect vests in them is under the Sydney Corporation Act of 1879 (43 Vict. No. 3), which states that "All public ways in the city of Sydney now or hereafter formed shall be vested in the council, who shall have full power," and so on.

Now it has been settled by repeated authorities, which were referred to by the learned Chief Justice, that the vesting of a street or public way vests no property in the municipal authority beyond the surface of the street, and such portion as may be absolutely necessarily incidental to the repairing and proper management of the street, but that it does not vest the soil or the land in them as the owners. If that be so, the only claim that they could make would be for the surface of the street as being merely property vested in them quâ street, and not as general property. Their Lordships are of opinion that that is not the subject-matter of compensation, but the street being diverted into a tramway is in no way a taking of property within the meaning of the compensation to be assessed under the Public Works Act of Sydney. In point of fact, it is rather the opposite, because the municipal authority, by getting rid of the street, pro tanto have less expense, and it is in that respect a relief to the ratepayers.

Then it has been said that the construction should not be given to the words "shall be vested in the Council" in the Sydney Corporation Act of 1879, which has been given to similar Acts in England, because there has been an amending Act passed which seems, as is suggested, to widen that interpretation as to what is vested in them. Their Lordships are of opinion that the amending Act does not do so. It provides that, "It shall be lawful for the Municipal Council of Sydney, for the purpose of opening, altering, and widening," &c., to purchase land, to exchange land, or to sell land. That must mean to which they are really entitled as land, and which as a matter of law they have acquired, and can sell like any ordinary individual.

Their Lordships are of opinion, therefore, that the judgment of the Supreme Court ought to be affirmed, and they will

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accordingly humbly advise Her Majesty to that effect. The appellant must pay the costs of this appeal.

Solicitors for appellants: *Barraud & Jupp.*
Solicitors for respondent: *Light & Galbraith.*

[PRIVY COUNCIL.]

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March 9, 10; *April* 1.

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } APPELLANT;

AND

WALTERS AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Crown Lands Act, 1884, s. 13, *sub-s.* 2; *ss.* 14, 18, 19, 20, 39—*Power of the Minister to Declare a Forfeiture of Conditional Purchases—Finality of Finding of Land Board.*

Held, that any reference to the Land Board on an issue of fact which, if found against the conditional purchaser, involves the forfeiture of his purchase, must, even if framed under s. 13, sub-s. 2, of the Crown Lands Act of 1884, be tried in manner prescribed by s. 14, and that the finding thereon is final under s. 20.

If the finding is that the statutory requirements have not been complied with, s. 39 gives a discretionary power to the Minister to declare a forfeiture. That power is not swept away by the Act of 1889, which established a Land Court to hear appeals from the Land Board in lieu of the Minister to whom such appeals lay under ss. 18 and 19 of the Act of 1884.

APPEAL from a judgment of the Supreme Court (July 3, 1896) reversing by a majority (Darley C.J. and Cohen J.; dissentiente Manning J.) the judgment of Owen J., Chief Judge in Equity (Sept. 13, 1895).

The effect of the Supreme Court judgment was that, as regards conditional purchases made under the Crown Lands Act of 1861, and subsisting at the time that the Act of 1884 came

* *Present:* THE LORD CHANCELLOR, LORD HERSCHELL, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

into operation, the power of declaring a forfeiture on non-fulfilment of the condition of improvements was by the Crown Lands Acts of 1884 and 1889 taken away from the Crown and subjected to the discretion of the local Land Board. The case is reported in 17 N. S. W. Rep. Eq. 105.

Conditional purchases commenced under the Act of 1861 (25 Vict. No. 1); s. 18, declaring the Crown's right in relation thereto. The definition of the word "improvements" in that section, and the time for making them, were varied by amending Acts.

Under the Act of 1884 local Land Boards were established; ss. 39, 20 and 136, as to forfeiture, being referred to in their Lordships' judgment, in which the facts of the case are stated.

Owen J. decreed in accordance with the prayer of the information, which was by the Crown to recover the lands in question. In appeal, Darley C.J. in effect held that the power of the Crown to determine a conditional purchase made under the earlier Acts on non-fulfilment of the conditions has by the Acts of 1884 and 1889 been "completely swept away"; that all the Crown can now do is to refer to the local Land Board, under s. 20 of the 1884 Act, the question whether the land should be forfeited or not, and that the Land Board would have a discretion to decide that there should be no forfeiture although the condition of improvements has not in fact been complied with; that in the present case there has been no reference or decision under s. 20 at all, but only a report under s. 13, sub-s. 2, which was not binding on any one, and that the conditional purchase is still subsisting.

Vaughan Hawkins (*Cozens-Hardy, Q.C.*, with him), for the appellant, contended that the judgment of the Supreme Court was wrong. The lands in question had always been and remained the property of the Crown, subject only to the inchoate title of the conditional purchaser. That was determinable at the option of the Crown on the non-fulfilment of statutory requirements, including the condition of improvements. The right of the Crown to declare a forfeiture was not

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taken away by anything in the Acts of 1884 and 1889. The Minister was at liberty to take the course prescribed by s. 39 of the Act of 1884 as applicable to conditional purchases after that Act came into force. Neither of the later Acts affected the Crown's right to declare a forfeiture or to eject. That right arose as soon as the Land Board, after due inquiry, had reported non-fulfilment of the condition as to improvement. In this case that report was final and had been regularly made.

The respondents did not appear.

1898 *April* 1.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The Crown in this case seeks to recover certain lands in the parish of Cumbertine, in the county of Camden, which were the subject of two conditional purchases—an original conditional purchase of 400 acres on June 21, 1883, and an additional conditional purchase of 44½ acres on February 28, 1884. The contention of the Crown is that the lands became liable to forfeiture, and have been duly forfeited, for non-compliance with the statutory conditions in regard to improvements. The original selector or conditional purchaser was one Moore. In 1888 he transferred his purchases to one Walters, apparently by way of mortgage. In December, 1890, he conveyed the equity of redemption to the respondent Black. Moore and Walters have both been disposed of. The respondent Black, who is in possession of the land, resists the claim of the Crown on the ground that the proceedings on the part of the Crown were unauthorized and irregular, and that the alleged forfeiture was therefore invalid. In the Courts below some question was raised or suggested as to the position of the respondent Black. But for the purposes of this case it may be assumed that he duly became entitled to Moore's conditional purchases subject to the statutory conditions attached thereto.

The conditional purchases having been made before January 1, 1885, when the Crown Lands Act of 1884 came into force, the conditions with regard to improvements applicable to the case, under the combined operation of the Crown Lands (Alienation) Act of 1861 and the amending Acts of 1875 and 1880, were that

the lands should be improved to the value of 6*s*. per acre within three years and of 10*s*. per acre within five years after the purchase; but the Act of 1875, s. 17, provided that the period of three years might be held to commence from the date of the survey of the lands conditionally purchased.

Sect. 18 of the Act of 1861 declared that on default of a compliance with the requirements of that section, which included a condition as to improvements to some extent varied by subsequent enactments, the land conditionally purchased should "revert to Her Majesty," an expression which in the Act of 1880 and in subsequent Acts is treated as equivalent to the expression "become liable to forfeiture." The Act of 1861 provided no machinery for determining or investigating any question between a conditional purchaser and the Minister in charge of Crown Lands. By the Act of 1861, as amended by the Act of 1875, the requirements of s. 18 of the former Act were to be held to have been complied with on a statutory declaration being made as therein prescribed and "on the Minister being satisfied," and thereupon, on payment of the balance of the purchase-money, the grant in fee was to issue.

By the Act of 1875, s. 25, the Governor in Council was empowered to appoint a Commissioner to whom should in case of dispute or question and might in every case be referred by the Minister the claim of a conditional purchaser to a grant, and complaints by any person that a conditional purchaser had not fulfilled or was not fulfilling the condition as to improvements. The Commissioner was to hear evidence in open court and report to the Minister. The Act, however, did not contain any provision making the Commissioner's report final as between the parties, or in any way binding upon the Minister. Both before and after the Act of 1875 it was held that the action of the Minister in declaring a forfeiture for non-compliance with statutory conditions might be questioned at law, and that if it were so questioned it was incumbent on the Minister to prove that the forfeiture was justified.

The Act of 1884 repealed the previous Acts, but it contained a provision (s. 2 B) to the effect that, notwithstanding such repeal, all rights accrued and obligations incurred and imposed

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under or by virtue of any of the repealed enactments should, subject to any express provisions of that Act in relation thereto, remain unaffected by such repeal.

The Act then proceeded to re-enact the repealed code of land legislation with various modifications and amendments. In place of the provisions relating to the appointment of a Commissioner under the Act of 1875, it contained a group of sections (ss. 11–20) providing for the establishment of local Land Boards, and defining their duties, mode of procedure, and powers. Sect. 13 provided that, in addition to the matters thereinafter "required or permitted to be made the subject of adjudication . . . . inquiry or report by local Land Boards," it should be the duty of every Land Board to hear, examine, and report to the Minister upon (among other things):—

"(II.) Any complaint or question as to the non-fulfilment of any condition of residence or improvement by a conditional purchaser under any of the said repealed Acts."

Then followed provisions regulating procedure. Every local Land Board was to hear and determine all complaints and other matters brought before it, and was to conduct all inquiries sitting as in open court, with power to take evidence on oath and to compel attendance of witnesses, the procedure being the same as the procedure before a court of petty sessions. The decision of the board was to be given in open court, and immediately after adjudication or decision upon any case the chairman of the board was to forward all papers connected with the case, together with any report required thereon, to the Minister. Sects. 18 and 19 provided for an appeal to the Minister. But these two sections were repealed by the Act of 1889, which established a Land Court for the hearing of appeals and for other purposes. Sect. 20 of the Act of 1884, on which the question in this case mainly depends, is in the following terms:—

"20. Any question of lapse, voidance or forfeiture, whether arising under this Act or any of the said repealed Acts, may be by the Minister referred to the local Land Board, and the decision thereon of the said board, after due investigation in open court, shall, unless appealed from in the prescribed manner, be final."

Sect. 136 provided that every forfeiture of land conditionally purchased, whether under that Act or any of the said repealed Acts, should be deemed to operate as a forfeiture of all additional conditional purchases held in virtue of such first-mentioned lands, and that whenever any land should be forfeited under that Act, such land should become Crown land, and might be dealt with as such, but no forfeiture of any purchase under that Act or any Act thereby repealed was to take effect until the expiration of thirty clear days after notification of such forfeiture in the *Gazette*.

In 1887 the Minister for Lands directed that the period of three years within which improvements to the value of 6*s*. per acre were to be made on the lands comprised in Moore's conditional purchases should be held to commence from the date of the survey which had been finally approved on February 26, 1885.

On June 18, 1888, at the instance of the Minister, the local Land Board held an inquiry, and, having taken evidence, found that improvements to the value of 6*s*. an acre had been placed upon the land within three years from the date of the acceptance of the survey by the Surveyor-General. It is common ground that this inquiry was held under s. 20 of the Act of 1884, and that the decision upon it became final under that section.

On August 4, 1891, the period of five years allowed for completion of the improvements having expired since the former proceedings, the Minister further referred to the local Land Board in addition to certain questions which are not now material, the question whether the condition of improvements to the value of 10*s*. per acre had been fulfilled or not. Notice to appear on the investigation before the Land Board was duly served upon the respondent Black. He appeared by a solicitor, and objected to the proceedings.

The inquiry by the Land Board took place on October 28, 1891, and four subsequent days. On December 14, 1891, the local Land Board gave their decision as follows: "Having taken evidence and inquired into the said matter, 'we find that 400 acres contained in C. P. 83. 11' (the original conditional purchase) 'never was improved to the value of 200*l*., and that

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44½ acres contained in C. P. 84. 7' (the additional conditional purchase) 'never was improved,'" and they reported to the Minister accordingly.

Walters appealed against the finding of the local Land Board. The respondent Black was served with notice of the appeal, but did not appear. On June 10, 1892, the Land Court dismissed the appeal.

On August 10, 1892, the then Minister for Lands approved of the forfeiture of Moore's conditional purchases. Notice of forfeiture appeared in the Government *Gazette* of September 21, 1892.

On August 8, 1894, the Attorney-General filed an information in equity in the Supreme Court against the respondents Walters and Black and the respondent Coffill, a caretaker in possession on behalf of Black, praying that the title of the Crown to the land in question might be established, and that Black and Coffill might be ordered to deliver up possession.

Walters appeared and submitted to such decree as the Court should think fit to make. Coffill disclaimed. The respondent Black filed a statement of defence, claiming to be entitled to the land as purchaser for value. He denied that the local Land Board duly investigated the questions referred to it, as alleged in the information.

On December 13, 1895, the Chief Judge in Equity made a decree in accordance with the prayer of the information.

The respondent Black appealed to the Full Court.

On July 3, 1896, the Full Court (Darley C.J. and Cohen J., Manning J. dissenting) reversed the decree as against Black, and dismissed the information. The Chief Justice held that the power of the Minister to declare a forfeiture had been since the repeal of s. 18 of the Act of 1884 by the Act of 1889 "completely swept away." He thought that the finding of the local Land Board of December 14, 1891, was a finding upon a reference under s. 13, and not under s. 20 of the Act of 1884, and that, being under s. 13, it bound no one. His view was that the Minister, if he pleased, might have disregarded it altogether, but that if he still thought that the case was one that justified a forfeiture, the only course open to him was to refer the question

of forfeiture to the Land Board, "which tribunal may," he said, "in their judicial discretion refuse to decide in favour of a forfeiture, notwithstanding that they had already reported according to the fact that the condition of improvements had not been complied with."

Their Lordships are unable to accept the conclusions of the Full Court. They agree in the opinion of the Chief Judge in Equity, and in the very able and careful judgment of Manning J. They think that the reference which resulted in the findings of December 14, 1891, must be taken to have been made under the provisions of s. 20 of the Act of 1884. They are unable to agree with the Chief Justice in thinking that the power of the Minister to declare a forfeiture has been swept away, nor can they agree in his view that a judicial discretion to refuse to decide in favour of a forfeiture has been committed to the Land Board.

The reference to the local Land Board was certainly not made in that precise and careful way in which one would expect an important Government department to conduct its business. But there can be no doubt as to the meaning of the reference. The local Land Board had adjudicated under s. 20 on the question whether the required improvements had been made within the period of three years. Their decision on that point was final. The period of five years had expired and the time had come for completing the investigation. The papers were sent back in a somewhat slovenly fashion, but with an intimation to the Land Board of the issues on which their opinion was desired. The matter on which the Minister required their report fell properly under s. 20. An inquiry without the element of finality would have been idle, and might have been a great hardship on the conditional purchaser. The Land Board conducted the investigation in a regular and formal manner, and they reported to the Minister the decision at which they arrived. The Act of 1884 does not prescribe any particular form of reference under s. 20. There seems to be no reason why a decision upon a reference framed in the words of sub-s. 2 of s. 13, though not containing anything pointing directly and in terms to s. 20, should not be final under the provisions of that

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section if the question is really a question of forfeiture—that is, an issue of fact which, if determined against the conditional purchaser, would render the purchase "liable to forfeiture."

Questions of "lapse," "voidance," and "forfeiture," which may be referred to the Land Board under s. 20, are in their Lordships' opinion questions of fact to be determined by the board after a trial held in manner prescribed by s. 14. "Voidance," to give an example, would include a case where the Legislature has declared that in a certain event the purchase "shall become void," as, for instance, under s. 7 of the Act of 1875, in the case of a false statement as to the age of the applicant for a conditional purchase. "Lapse" applies to cases where the conditional purchase has been abandoned, as mentioned in s. 17 of the Act of 1875. In both these cases the determination of the Land Board, as Manning J. observes, must be simply a determination on a question of fact. Why should it be otherwise in the case of forfeiture? The local Land Board have simply to determine whether the statutory requirements have been complied with or not. If those requirements are found to have been complied with, the power of the Minister to declare a forfeiture for non-compliance is at an end. If the finding is the other way, the discretionary power of declaring a forfeiture with all responsibility rests with the Minister. It must be so, as Manning J. points out, in cases of forfeiture of conditional purchases under the Act of 1884. For s. 39 of the Act of 1884, which applies to conditional purchases under that Act, declares that if the local Land Board shall report to the Minister that after due inquiry held by such board the conditions prescribed have not been duly fulfilled, "it shall be lawful" for such Minister to declare the conditional purchase to be forfeited. The discretion by that section is given to the Minister and to no one else. In the absence of any distinct provision making a difference between conditional purchases under the Act of 1884 and those under the earlier Acts, it is difficult to suppose that the Legislature could have intended that in the one case the discretion should rest with the Land Board, and in the other with the Minister.

Their Lordships are of opinion that the judgment under

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appeal should be reversed, and the appeal to the Full Court dismissed with costs, and the judgment of the Chief Judge in Equity restored, and they will humbly advise Her Majesty accordingly.

As the difficulty in this case is mainly due to the carelessness of the Land Department, their Lordships think that the appellants should bear their own costs of this appeal.

Solicitors for appellant: *Light & Galbraith.*

[PRIVY COUNCIL.]

J. C.* 1898 *March* 23; *April* 29.

YOUNG . . . . . DEFENDANT;

AND

ADAMS . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Act (59 *Vict. c.* 25), *s.* 58—*Construction—Retrospective Effect—Dismissal of Civil Servant.*

Retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language.

Midland Ry. Co. v. *Pye*, (1861) 10 C. B. (N.S.) 191, approved:—

Held, that the New South Wales Act (59 Vict. c. 25), s. 58, which enacts that "Nothing in this Act or in the Civil Service Act of 1884 shall be construed or held to abrogate and restrict the right of the Crown as it existed before the passing of the said Civil Service Act to dispense with the services of any person employed in the public service," is not retrospective in its operation:

Held, that the respondent, who had been dismissed from the public service before the said Act came into operation, but not in manner prescribed by the Act of 1884, was not affected by the provisions of the later Act, which only apply to persons actually employed in the public service at and after the date thereof.

APPEAL from an order on demurrer of the Supreme Court (April 26, 1897).

The respondent sued the Minister of Public Works for

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damages for wrongful dismissal from the Civil Service. The appellant pleaded the right of the Government to dispense at pleasure with the services of any person employed in the public service. The respondent demurred, contending that the right relied on in the plea was abrogated by the Civil Service Act, 1884, and had not been revested in the Crown at the time of the grievance complained of.

The facts are stated in the judgment of their Lordships.

The question involved in the appeal was one of construction of the Public Service Act, 1895 (59 Vict. No. 25), and the Civil Service Act, 1884 (48 Vict. No. 24), and was chiefly whether s. 58 of the Act of 1895 had retrospective effect.

The opinion of Darley C.J. on this point is thus expressed. After referring to the principles of construction as laid down by Erle C.J. in *Midland Ry. Co.* v. *Pye* (1) and by Lopes L.J. in *Bourke* v. *Nutt* (2), he proceeded:—

"Now, in the case before the Court, there are three classes of Civil servants who come under consideration—first, those who entered the employment of the Government after the Act of 1884, and were dismissed before the Act of 1895 came into force; secondly, those who entered the service after the Act of 1884 and continued in the service after the passing of the Act of 1895; thirdly, those who entered the service after the Act of 1895. With respect to the third class no question can arise. With respect to the second class it may be held that s. 58 is in part retrospective, inasmuch as it puts an end to some of the terms of the contract under which they entered the service.

"It does not, however, follow from this that the section is, therefore, retrospective as regards the first class. In *Reid* v. *Reid* (3) Bowen L.J. points out the distinction. After observing that except in special cases a new law should be construed so as to interfere as little as possible with vested rights, he adds: 'It seems to me that even in construing an Act which is to a certain extent retrospective, and in construing a section which is to a certain extent retrospective, we ought nevertheless to bear in mind that maxim as applicable when-

(1) 10 C. B. (N.S.) 191. (2) [1894] 1 Q. B. 737.
(3) (1886) 31 Ch. D. 402, 408.

ever we reach the line at which the words of the section cease to be plain. That is a necessary and logical corollary of the general proposition that you ought not to give a larger retrospective power to a section, even in an Act which is to some extent intended to be retrospective, than you can plainly see the Legislature meant.'

"With respect to the first class within which the plaintiff falls, I am clearly of opinion that the section does not contain that clear, plain, and unambiguous language which would entitle me to hold that a cause of action well vested in the plaintiff during several months of 1895 was put an end to, thus depriving the plaintiff of a well-ascertained vested right arising out of a breach of a contract entered into between the plaintiff on the one side and the Government on the other. When the section is read according to its strict grammatical construction, it will be seen that it refers only to the present and the future; there is no word in the section indicating the past.

"The section may be fairly paraphrased as follows: 'No Court shall hold that anything in the Civil Service Act of 1884 abrogates or restricts the rights or powers of the Crown to dispense with the services of any person employed in the public service.'

"In order that it should be applied to the past as affecting those within the first class, the words 'or has abrogated' should have been introduced after the word 'abrogates,' and after the word 'employed' the words 'or who has been employed' should also have been introduced. Mr. Stephen argued that the words 'to dispense with the services of any person &c.' were merely descriptive; perhaps so, but in such case they do not include within the description persons who had been wrongfully dismissed before the Act of 1895 came into force. Suffice it to say that there are no express words which abolish the plaintiff's vested right to bring this action, nor can I see any words from which it can be fairly and reasonably implied that this was the intention of the Legislature.

"'Intention of the Legislature,' said Lord Watson in *Salomon* v. *Salomon* (1), 'is a common but very slippery phrase,

(1) [1897] A. C. 38.

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which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant although there has been an omission to enact it. In a court of law or equity what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact either in express words or by reasonable and necessary implication.'

"Here there are no express words, and, to my mind, it is unreasonable that an intention to defeat a vested right by retrospective operation should be implied from the words used. That the Legislature knew how to use apt words so as to make a section clearly retrospective is apparent from a consideration of the 60th section of the same Act."

Sir R. Reid, Q.C., and *V. Hawkins*, for the appellant, contended that judgment should have been entered for him on the respondent's demurrer. Prior to the Act of 1884, the Crown had the right to dispense at pleasure with the services of any Civil servant. The effect of that Act, it was held in *Gould* v. *Stuart* (1), was to take away that right, and thereafter the Crown could only dismiss for cause and in manner allowed by the Act. Pending that decision, the Act of 1895 was passed, s. 58 of which is declaratory of the law in a contrary manner from that of the decision just quoted. It was intended that s. 58 should be retrospective in effect, for it was intended to prevent the decision, dated May 23, 1895, of the Supreme Court in *Stuart* v. *Gould*, subsequently affirmed by the Privy Council, being applied to any other case. The view which the Legislature took was that provisions for penal dismissal after inquiry were not inconsistent with the right to dismiss at pleasure. Looking to the whole scope of the Acts of 1884 and 1895, it was contended that an officer should be held to be in the same position whether his services were dispensed with before or immediately after the passing of the Act of 1895. No action by the respondent was pending when this Act was passed, although the cause of action, if any, had

(1) [1896] A. C. 575.

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accrued. But at the date when the Court was called upon to declare the law the Act had come into effect. It was contended that the decision of the Court below was contrary to the express terms of s. 58.

[Reference was made to *Attorney-General* v. *Theobald* (1); *Attorney-General* v. *Marquis of Hertford* (2); *Rex* v. *Inhabitants of Dursley*. (3)]

Cozens-Hardy, Q.C., and *James Bacon*, for the respondent, were not heard.

1898
April 29.

The judgment of their Lordships was delivered by

LORD WATSON. The respondent entered the service of the Government of New South Wales in the year 1885, as a road surveyor, at a yearly salary. He continued in their employment in that capacity until June 30, 1895, when he was summarily dismissed without compensation.

During the period between the original engagement of the respondent and his dismissal, the rights of Civil servants in the Colony of New South Wales were governed by the Colonial Act, 48 Vict. No. 24. In the appeal *Gould* v. *Stuart* (4), it was held by this Board, affirming the judgment of the Supreme Court of New South Wales, that the power generally possessed by the Crown to dismiss a Civil officer at pleasure was restricted by the provisions of the Civil Service Act, 1884, and that the Government had no power to dismiss a Civil servant, except upon the grounds, and after the inquiry, which that statute prescribes.

Upon July 14, 1896, the present suit was brought by the respondent against the appellant, who had been duly appointed to be sued as nominal defendant on behalf of the Government of the Colony. The declaration sets forth the employment of the respondent as a Civil servant, and the fact that he was not dismissed in the manner and on the terms prescribed by the Civil Service Act of 1884; and it concludes with a claim for the sum of 6160*l.* as damages.

By his third plea in defence, the appellant maintained that

(1) (1890) 24 Q. B. D. 557.
(2) (1849) 3 Ex. 670.
(3) (1832) 3 B. & Ad. 465.
(4) [1896] A. C. 575.

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the services and employment of the respondent in the declaration mentioned "were the services of a person employed in the public service within the meaning of the Act 59 Vict. No. 25, s. 58, and the alleged grievances in the declaration mentioned were the exercise by the said Government of the right and power of the Crown, in the said section of the said Act mentioned, to dispense with the services of any person employed in the said public service and not otherwise."

The statute upon which the plea is founded, the short title of which is the Public Service Act of 1895, was passed upon December 23, 1895, five months after the summary dismissal of the respondent. The 58th section enacts that, "Nothing in this Act, or in the Civil Service Act of 1884, shall be construed or held to abrogate and restrict the right of the Crown as it existed before the passing of the said Civil Service Act to dispense with the services of any person employed in the public service."

The respondent demurred to the third plea, and the appellant joined in the demurrer, which was then heard before the Supreme Court of the Colony. On April 26, 1897, the majority of the Court, consisting of Darley C.J. and Owen J., gave judgment for the respondent, dissentiente Stephen J. Their Lordships have come to the conclusion that the decision of the majority was right, and they approve of the reasons which were assigned for it in the opinion delivered by Darley C.J.

It was argued for the appellant that the provisions of s. 58, being declaratory, must of necessity be enforced by the Courts of the Colony in every case whether arising before or after the date of their enactment; and consequently that, the present case having been brought before the Supreme Court after December 23, 1895, when the Public Service Act, 1895, became law, the summary dismissal of respondent must be held to have been within the power of the Government, although on June 30, 1895, when it took place, such act of dismissal may have been illegal, and might then have given the respondent a good cause of action. It may be true that the enactments are declaratory in form; but it does not necessarily follow that they are therefore retrospective in their operation, and were meant to apply

to acts which had been completed or to interests which had vested before they became law. Neither the context of the statute, nor the terms of the clause itself, appear to their Lordships to favour that result.

Sect. 58 is the last of a group of ten clauses which are collected under the statutory heading, "Dismissals, Removals, &c.," which is part of the statute, and must be taken into account in construing its provisions. Leaving s. 58 out of view in the meantime, the other clauses of the group deal exclusively with the dismissal, removal, or punishment of officers permanently employed in the public service, in consequence of misconduct committed after the commencement of the Act of 1895. Sect. 58 is complementary of these provisions, and restores the power of the Crown, which was taken away by the Act of 1884, to dismiss at pleasure and without cause assigned. The right or power which it restores is "to dispense with the services of any person employed in the public service." Can these words be reasonably construed so as to include persons who are not employed in the public service, and who, like the respondent, had ceased to be so before its power of summary dismissal was given back to the Crown? In the opinion of their Lordships, the words of the clause as they stand do not admit of that construction. Counsel for the appellant were by the exigencies of their case driven to maintain the contrary, and they accordingly argued that the clause ought to be read in the same way as if after "any person employed in the public service" there had been inserted "or who before the passing of this Act "had been dismissed from the public service." The words of the clause, according to their ordinary and natural meaning, refer to persons who are employed in the public service; and neither in s. 58, nor in the context of the Act, is there to be found any expression which can qualify that meaning, and make them refer to persons who had been but had ceased to be employed before the Act came into existence.

Their Lordships are unable to discover the least analogy between the enactments which require to be construed in this appeal and those which were under the consideration of the

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Court in *Rex* v. *Inhabitants of Dursley* (1), and in *Attorney-General* v. *Theobald* (2), which were much relied on in appellant's argument. It does not seem to be very probable that the Legislature should intend to extinguish, by means of retrospective enactment, rights and interests which might have already vested in a very limited class of persons, consisting, so far as appears, of one individual, namely, the respondent. In such cases their Lordships are of opinion that the rule laid down by Erle C.J. in *Midland Ry. Co.* v. *Pye* (3) ought to apply. They think that, in a case like the present, the learned Chief Justice was right in saying that a retrospective operation ought not to be given to the statute, "unless the intention of the Legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks one's sense of justice that an act legal at the time of doing it should be made unlawful by some new enactment." The ratio is equally apparent when a new enactment is said to convert an act wrongfully done at the time into a legal act, and to deprive the person injured of the remedy which the law then gave him.

Their Lordships do not suggest that the language of s. 58 is in any sense ambiguous. On the contrary, its enactments appear to them to have plain reference to persons who are actually employed in the public service at and after the date of the Act of 1895, and to those persons only. In their opinion, no construction is possible which would extend the enactments to persons who had ceased to be employed in the public service before the date of the Act without reading into the clause words which are not implied, and are not to be found there.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Solicitors for appellant: *Light & Galbraith.*

Solicitors for respondent: *Ullithorne, Currey & Currey.*

(1) 3 B. & Ad. 465. (2) 24 Q. B. D. 557.
(3) 10 C. B. (N.S.) 191.

[PRIVY COUNCIL.]

In re ENDOWED SCHOOLS ACT, 1869, 1873, AND 1874, AND *In re* A SCHEME RELATING TO GRAMMAR SCHOOL IN COLCHESTER.

J. C.*
1898
March 30;
May 14.

Endowed Schools Act, 1869, *ss.* 19, 39—*Locus Standi of Petitioners—Ratepaying Parents of Scholars.*

In appeal from a scheme relating to a grammar school:—

Held, (1.) that the petitioners, who were ratepayers of the borough where the school was situate and parents of scholars attending the school, were not in either capacity persons directly affected by the scheme within the meaning of s. 39, and, therefore, had no locus standi for appeal;

(2.) that although an opinion of the commissioners that s. 19 applies is appealable, it is so only as mentioned in the Act, which requires that the petitioners be aggrieved by the scheme and not by the opinion on which it is founded;

(3.) that they were not so aggrieved, for, whether that opinion was right or wrong, the scheme having received the consents required by the section, was in either view in conformity with the Act.

THIS was a petition by Nash and Thorrington, who were inhabitants and ratepayers of the borough of Colchester and the parents of sons who at the date of the scheme and of the petition were and had for some time past been scholars attending the Colchester Grammar School. The scheme was settled in accordance with a decision of the Charity Commissioners that the endowment in question fell within s. 19 of the Endowed Schools Act, 1869.

The petitioners submitted—(1.) That the scholars educated by the endowment are not required by any of the express terms of the original instrument of foundation, or by any of the express terms of any statutes, or regulations made by the founder or under his authority in his lifetime, or within fifty years after his death, to learn or to be instructed according to the doctrines or formularies of any particular Church, sect, or denomination. (2.) That even if this contention be ill-founded,

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD DAVEY, and SIR RICHARD COUCH.

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no such express terms had been observed down to the commencement of the Endowed Schools Act, 1869 (August 2, 1869). The foundation does not fall within the provisions of sub-s. 1 of the said s. 19.

Sect. 19, sub-s. 1, excepts from certain provisions in the Act relating to religious instruction and attendance at religious worship, and to the qualification of the governing body and masters, "any school which is maintained out of the endowment of any cathedral or collegiate church, or forms part of the endowment of any cathedral church"; unless the governing body, constituted as it would have been if no scheme under this Act had been made, assents to such scheme. The decision turned on the locus standi of the petitioners rather than on the nature of the scheme and the grounds of petition. The objection thereto was taken in the printed case for the Charity Commissioners, namely, that there was no evidence of the petitioners being inhabitants and ratepayers, as they alleged; if so, they were not persons "directly affected" within s. 39 of the Act of 1869; and the validity of the scheme did not in any way depend upon the question raised under s. 19.

Cyril Dodd, Q.C., and *J. S. Fox*, for the petitioners, contended that the petitioners had a locus standi as parents of scholars attending the school, and that, if s. 19 did not apply, they were entitled to the relief of having the scheme remitted to the commissioners for reconsideration, as a necessary consequence of a decision by the commissioners that s. 19 did apply, having been made appealable. [Reference was made to *In re Shaftoe's Charity* (1) and *In re Hemsworth School.* (2)]

Yelverton appeared for persons who had not filed a petition, and was not heard.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners, were not called on.

1898 *May* 14.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. This is a petition of appeal to Her Majesty in Council, presented under the 39th section of the

(1) (1878) 3 App. Cas. 872. (2) (1887) 12 App. Cas. 444.

Endowed Schools Act, 1869. The scheme is one for the administration of the Colchester Grammar School. The petitioners are two in number. They describe themselves as inhabitants and ratepayers of the borough of Colchester, and as parents of sons attending the school. They allege that they are directly affected by the scheme, and feel aggrieved by it, and by the provisions for the school contained therein, and by the decision of the Charity Commissioners, on which the scheme is founded, given on or about March 31, 1894, that the endowment in question did fall within the provisions of s. 19 of the Endowed Schools Act, 1869. They pray that the scheme may be remitted to the commissioners with such declaration as the nature of the case may require.

For the purpose of deciding this appeal it is not necessary to state in detail the origin or history of the endowment. It was effected by Royal Charters, one of King Henry VIII. and one of Queen Elizabeth, conveying lands to the corporation of Colchester for the maintenance of a free grammar school and for general town purposes. Power to make statutes was vested in the Bishop of London and the Dean of St. Paul's, who have done so at intervals. The statutes now in operation were made by those dignitaries in the year 1844. There was also a body of trustees for the property of the school established by the Court of Chancery in the year 1698, and filled by appointments from time to time.

Both before and after the passing of the first Endowed Schools Act, there has been discussion with the view of framing a new scheme for the school. Some years ago the Charity Commissioners prepared a draft scheme, which was opposed on the ground that it contained provisions which, if the endowment falls within s. 19 of the Act of 1869, it ought not to contain except with the consent of the governing body. That raised the question whether the endowment does or does not so fall, and the commissioners thought it necessary to decide that question.

On March 31, 1894, the secretary of the commissioners addressed a letter to the town clerk of Colchester, which, so

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far as it relates to and raises the present question, is as follows:—

"I am directed by the Charity Commissioners to state for the information of the town council that owing to their failure to obtain the consent of the several governing bodies of the above-named endowment to the terms of the compromise proposed in the published draft scheme, the commissioners have been constrained to determine the question whether the endowment does or does not fall within the provisions of s. 19 of the Endowed Schools Act, 1869, and they are of opinion that the endowment does so fall.

"The consequence of this decision is that, apart from consent the commissioners are precluded by statute from introducing into the scheme 'any provision respecting the religious instruction or attendance at religious worship of the scholars' (other than a provision giving exemption to day scholars on whose behalf it is claimed from attending prayer or religious worship, or lessons on a religious subject), 'or respecting the religious opinions of the governing body or masters.'

"The following clauses of the scheme will therefore be struck out—viz., Clauses, 2, 31, 52, 53 (except so much as secures the exemption above referred to), and words will be inserted disclaiming (subject as above mentioned) all interference with subsisting legal requirements respecting the religious instruction or attendance at religious worship of the scholars, or the religious opinions of the governing body or masters.

* * * * *

"With these amendments the commissioners propose to submit the scheme in due course to the Education Department.

"I am however to point out that clauses 2, 31, and 53 (in its entirety), as to which there appears to be no controversy, can be retained if the several governing bodies assent to the scheme with such retention. In order to afford opportunity for the expression of such assent the commissioners will wait for a period of four weeks before submitting the scheme to the Education Department."

After some further negotiations, it seems that provisions either identical with, or to the same substantial effect as, the

opposed clauses were agreed to. The Charity Commissioners then issued a new draft, to which the several governing bodies signified their consent in a formal way. That draft is the scheme now under appeal.

The petitioners contend that as the decision of the commissioners announced in their letter of March, 1894, with reference to s. 19, is expressly made subject to appeal by that section, they have a right to challenge it, and, if it is found to be erroneous, to require the scheme to be remitted to the commissioners for revision. The commissioners object that it is improper to enter on the question whether the endowment falls under s. 19: first, because the petitioners are not persons directly affected within the meaning of s. 39; and secondly, because, assuming that the judgment of the commissioners is wrong, the scheme is still within their jurisdiction as to all its provisions, and therefore the petitioners cannot be aggrieved by the decision. Their Lordships think that the petitioners fail to meet these preliminary objections. To a certain extent the two objections are mixed up together, because it cannot be determined who is directly affected without examining the scheme to see what interests it affects. Their Lordships will first deal with the second of the objections.

Though s. 39 is very familiar to all engaged in these discussions, it will be convenient to extract the expressions relevant to the present contention, which so far as their Lordships know is quite a new one.

"If . . . . any person . . . . directly affected by such scheme feels aggrieved by the scheme on the ground—

"(1.) Of any decision of the commissioners in a matter in which an appeal to Her Majesty in Council is given by this Act; or,

* * * * *

"(3.) Of the scheme being one which is not within the scope of, or in conformity with this Act;

"such . . . . person . . . . may . . . . petition Her Majesty in Council . . . . praying Her Majesty to withhold her approval from the whole or any part of the scheme."

The petitioners do not any longer contend that they can

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bring their case within head (3.) of the grounds of appeal; because, as before stated, on either view of the applicability of s. 19, the scheme, having received the consents required by that section, is in conformity with the Act. They are, therefore, driven to contend that they have a right to appeal from the declared opinion of the commissioners that s. 19 is applicable, and, if they succeed, to have the scheme remitted on the speculation that the commissioners may alter their minds on points which in either view of s. 19 are within their competence.

It would be very unfortunate if the Act had given an appeal on an abstract matter of this kind, not involving any illegality or irregularity. Certainly their Lordships cannot find any warrant for it in the words of the Act. The person entitled to appeal must be aggrieved, not by the abstract decision, but by the scheme on the ground of the decision; that is, by some practical result of the decision taking effect in the scheme. It is true that s. 19 says that the opinion of the commissioners is subject to appeal; and so it is, but only "as mentioned in this Act," that is, as mentioned in s. 39; and the right of appeal there given is an appeal against the scheme, and does not arise till the scheme has been approved by the Education Department. Moreover, if the opinion of the commissioners is overruled, the remedy is to make a declaration to that effect, and to remit the scheme in order that it may be brought into conformity with the declaration (s. 43). But this scheme contains nothing which is not in conformity with the declaration prayed for by the petitioners. The commissioners and the Education Department might consistently with such a declaration approve of the very scheme now under appeal. Her Majesty in Council cannot properly be asked to pronounce a decision quite barren of legal result.

In point of fact, so far as the scheme deviates from the strict lines to which the commissioners are confined by s. 19, it is in favour of the views of the petitioners. The only clause which they point to as embodying a grievance to them is clause 33, which requires the master, who by the existing statutes of 1844 must be in Holy Orders, shall henceforward be a member of

the Church of England. But it is within the discretion of the commissioners to make that less stringent provision with the consent of the governing bodies, which, as before mentioned, has been given.

The result is that in the judgment of their Lordships the petitioners are not aggrieved by any part of the scheme which rests on the disputed decision of the commissioners, and that they cannot, even if they had a locus standi for any appeal, ask for a review of that decision. Whether or no they have such a locus standi is the subject of the first preliminary objection, and is a question of considerable importance in the working of these Acts.

The right of appeal on legal grounds is carefully limited by s. 39 as regards both the subjects of appeal and the persons who are entitled to appeal. The petitioners have no right unless they are directly affected by the scheme. They do not shew how they are directly affected except by describing themselves in the terms above stated. That description is not supported by evidence, but it may be taken for the purpose of this argument as being accurate. The school is for those who belong to Colchester, and in a sense all who belong to the place have an interest in, and are affected by, a scheme for such an important institution as its school. It is manifest that such an interest as that is not within the meaning of the term "directly affected." That term points rather to a personal and individual interest as distinct from the general interest which appertains to the whole community among which the endowment works.

But it is said that they have boys who are at the school, and that they are directly affected through these boys. Assuming that what affects the boy affects the parent, do these boys fall within the class of persons mentioned in s. 39 as directly affected by this scheme? The scheme does not turn any boy out of the school, nor remove the school away from him, nor in any way deprive him of the benefits of the education he is receiving. It is not alleged that the boys are on the foundation of the school; they appear to be ordinary pupils attending it. But even if they were on the foundation, and if they were

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interfered with, what right of appeal would they have? Sect. 13 of the Act, which deals with vested interests, provides only for the vested interests of boys who were on the foundation when the Act passed, i.e., on August 2, 1869. Sect. 39 gives a right of appeal to persons whose vested interest is not treated as required by the Act. It is clear that even boys on the foundation, if they have come upon it later than the year 1869, have no right of appeal given to them on the ground that their own interests are affected. It would be extravagant to hold that it was intended to give them a right of appeal against the scheme on other grounds because they are persons directly affected, when they cannot appeal in their own personal interest. Yet their Lordships are asked to affirm a more extravagant proposition, namely, that the parent of every boy who happens to be at school when the scheme is approved has a right of appeal against any appealable matter which is not in conformity with his views.

In the *Hemsworth School Case* (1) the scheme complained of removed the site of the school from Hemsworth to Barnsley. A petition of appeal was presented by inhabitants of Hemsworth whose children were at the school. It was held that inhabitants as such had no locus standi for appealing; they could only appeal in respect of some vested interests of their boys, and the vested interests saved by the Act had been spent many years before. This decision accords in principle with the previous decisions in the *Haydon Bridge School Case* (2) and the *Sutton Coldfield School Case* (3), and it is even more closely applicable to the present case. Indeed, so far as the facts of the present case constitute any distinction, they are less favourable to the right of appeal than those of the *Hemsworth Case* (1), for the removal of the school did affect the interests of the Hemsworth boys in a material sense, only it was not the sense contemplated by the Act in ss. 13 and 39. The argument perhaps was not presented as it has now been presented for the petitioners, but the decision clearly governs the present case.

The petitioners have no such right as they claim. They

(1) 12 App. Cas. 444. (2) *In re Shaftoe's Charity*, 3 App. Cas. 872.
(3) (1881) 7 App. Cas. 91.

may at due times make representations to the Education Department or to the Houses of Parliament, but they cannot appeal to the Queen in Council. The commissioners ask for costs; but costs have never been given to them in such cases, and their Lordships do not see any reason to depart from the usual course. They will humbly advise Her Majesty to dismiss the petition.

Solicitors for petitioners: *Shepheards.*
Solicitors for commissioners: *Farrer & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1898 *June* 16.

THE CARLTON STEAMSHIP COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE CASTLE MAIL PACKETS COMPANY, LIMITED . . . . . } RESPONDENTS.

Ship—Charterparty—Ship to Load "always afloat as and where ordered by Charterers"—Insufficient Depth of Water in Dock—Detention of Ship.

A charterparty provided that a ship should proceed to a named dock and "there load in the customary manner (Sundays and holidays excepted) always afloat as and where ordered by the charterers, a cargo of rails." The depth of water in the dock varied with the tides and was sufficient at spring tides, but not at neap tides, for a ship of the size of the chartered vessel to load there always afloat, and this was within the knowledge of the owners and of the charterers. The ship having arrived in the dock the charterers ordered her to a berth where the loading began and continued for several days; then the water began to fall, and to avoid taking the ground the ship was compelled to leave the dock. After several days she returned with the spring tides and completed her loading. The shipowners having sued the charterers for demurrage or damages:—

Held, affirming the decision of the Court of Appeal, [1897] 2 Q. B. 485, that the charterers were not bound to do that which (as was known to the shipowners) might be physically impossible, namely order the ship when she arrived to a berth where she could then load continuously always afloat, and that they were not responsible for delay occasioned by natural and physical causes beyond their control.

The following statement of facts is taken from the judgment of Lord Watson.

The respondent company had, on February 1, 1897, contracted to provide steam tonnage for the conveyance of a quantity of material to be used in the construction of the Pretoria Pietersburgh Railway, from Maryport, and other ports in the United Kingdom or the Continent, to Delagoa Bay. With a view to part fulfilment of that contract, they on February 22, 1897, chartered from the appellant company the steamship *Carlton*, about 4000 tons burden. At the date of the charterparty the *Carlton* was at Barry taking in her bunker coal; and, by its terms, she was to proceed "to Senhouse Dock, Maryport, or so

near thereunto as she may safely get, and there load in the customary manner (Sundays and holidays excepted) always afloat as and where ordered by the said charterers, a full and complete cargo of rails $\frac{\text{and}}{\text{or}}$ accessories, say about 2850 tons, and not more than 3000 tons, and therewith proceed to Delagoa Bay." No time was specified for the arrival of the *Carlton* at Maryport beyond the expectation that she would reach that harbour on Wednesday February 24; but it was stipulated that in the event of the ship not being at their disposal at Maryport not later than March 5, the charterers should have the option of cancelling the charter.

It was by the charterparty provided that demurrage, if any, was to be paid for at the rate of 30*l.* for each working day, "except in case of strikes, lock-outs, labour disturbances, trade disputes, accidents, or other hindrance beyond charterers' control."

The depth of water in the Senhouse Dock, Maryport, depends upon the state of the tides, and may be affected to some extent by the winds which happen to prevail at the time. During the period of high water a depth of upwards of 17 feet may be relied on. Between these periods there is an interval of six or seven days during which the depth of water in the dock may not exceed 14 ft. 6 in.

The *Carlton* arrived in the basin of Maryport Harbour on the night of Saturday February 27, and on the morning of Sunday the 28th she went into the Senhouse Dock. At that time, owing to the bunker coal being on board, the ship was not upon an even keel, her draught forward being 11 ft., and aft 17 ft. 5 in. On Monday March 1 the charterers' agent gave an order to the master in these terms: "You will please place your steamer into the middle berth, east side Senhouse Dock, where your cargo is waiting shipment." From that time the controversy began which has developed into this litigation.

On the evening of Friday March 5 the *Carlton* was admitted by the harbour master to the berth to which she had been ordered, which had just been vacated by the *Abermaed*. At that date the current period of spring tides had so far elapsed that it had become impossible to begin and complete the loading

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of the ship before the return of the neaps. Between the Friday evening and the morning of Tuesday, March 9, 575 tons of cargo were put on board, after which the ship drew 15 ft. 9 in. forward, and 16 ft. 11 in. aft. The tides were then gradually ebbing, and even with the amount of cargo already on board the *Carlton* could not have lain afloat in the dock during the neaps. Accordingly, on the Tuesday morning, the *Carlton* left Maryport Dock and went to Barrow, where she offered to ship the remainder of the cargo.

Whilst matters stood in that position, an application was made to Mathew J. to determine the relative rights and obligations of the shipowners and the charterers; but a compromise was effected, by which it was arranged that, without prejudice to the rights of either party, the *Carlton* should return to the Senhouse Dock at Maryport, there load the remainder of her cargo, and get away by the next spring tides after March 17. In pursuance of that arrangement, the *Carlton* returned to her berth in the Senhouse Dock upon the morning of Tuesday March 16, and immediately commenced loading. On Saturday March 20 she left the dock with 2860 tons of rails on board.

On March 12, 1897, the appellants brought the present action against the respondents, in which they claimed damages for failure to name a proper berth under the charter; in the alternative, demurrage or damages in respect of (1.) detention of their ship for fifteen days, (2.) port and other charges during that period. Mathew J. entered judgment for the appellants for an amount to be agreed on by the parties, or, in case of their differing, to be settled by the Court. His order was set aside, and judgment entered for the respondents by a majority of the Court of Appeal, consisting of Lord Esher M.R. with Rigby L.J., A. L. Smith L.J. dissenting.

May 28; June 14. *Robson Q.C.* and *Scrutton* for the appellants. On February 28 the *Carlton* was an "arrived" ship, having entered her place of destination on that day. She was then under the charterparty entitled to receive her load within a reasonable time in the customary manner and always afloat. The term "always afloat" is an addition to,

not a qualification of, the term "in the customary manner," and the appellants were entitled to have the loading begun and proceed continuously "always afloat." The period of loading begins when the ship is an "arrived" ship: *Tapscott* v. *Balfour*. (1) For the principle upon which a reasonable time is to be calculated, see *Hick* v. *Raymond*. (2) The charterers knew or must be taken to have known the effect of the neap tides in the Senhouse Dock and that a vessel of the tonnage of the *Carlton* could not if she began to load on the day when she was ordered to begin, March 5, complete her loading "always afloat" till the next spring tides, i.e., that she could not be loaded in accordance with the terms of the charterparty; for it is unreasonable that the shipowners should be put to the expense of keeping the ship idle for a fortnight. It being impossible to continue the loading always afloat the *Carlton* did the best thing under the circumstances and went to the nearest port, Barrow, and offered to receive the rest of the cargo there. This was in accordance with the rule established in such cases by the authorities: *Shield* v. *Wilkins* (3); *General Steam Navigation Co.* v. *Slipper* (4); *The Alhambra* (5); and see *Brown* v. *Johnson*. (6) The charterers failed to perform their duty under the charterparty in not naming a proper berth where the ship could be loaded continuously always afloat, and in naming a berth where she could not be so loaded: they also failed in not so loading her within a reasonable time, and in the customary manner, i.e., without the delay that existed here.

Joseph Walton Q.C. and *James Fox*, for the respondents, were not heard.

LORD HERSCHELL. My Lords, notwithstanding the zeal and ability with which this case was argued by the learned counsel for the appellants and my sincere respect for the opinion of the learned judges who have taken a different view, I cannot bring myself to doubt that the judgment of the Court of Appeal,

(1) (1872) L. R. 8 C. P. 46.
(2) [1893] A. C. 22, 29, 31.
(3) (1850) 5 Ex. 304.
(4) (1862) 11 C. B. (N.S.) 493.
(5) (1881) 6 P. D. 68.
(6) (1842) Car. & M. 440.

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which is now under consideration, is correct. [His Lordship stated the facts.]

My Lords, it is argued that the charterers were bound to know the condition of the harbour, and that they were under some obligation in that respect which did not rest upon the shipowner. I do not propose to discuss the extent of the obligation on the one side or the other with regard to the knowledge of the condition of the harbour, but I can see no reason for holding that the obligation is different in the case of one party or of the other, or that the charterers were bound more than the shipowners to know what the conditions of the harbour were. I say I do not propose to discuss that for this reason, because without inquiring what knowledge each party is bound to possess I can entertain no doubt that this charterparty and the obligations and rights under it must be construed with reference to the natural conditions of the particular harbour which is to be according to the charterparty the place of loading. It is suggested that there may be cases in which particular berths are less favourable than others for the loading of a cargo, and that where the charterer has the right to name the berth it would be unreasonable to hold that he could name a berth which would render the period of loading longer, to the prejudice of the shipowner. That again is a question which I do not think it necessary to consider. It may be that considerations would arise in that case which have no place in the present one, because here it is not a question of the condition of a particular berth. The difficulty existed in regard to the entire dock and all the berths in it.

My Lords, the charterparty provides for no lay days—it contains no stipulation as to the time within which the cargo is to be loaded; therefore it is beyond dispute that the obligation which arose on the arrival of the ship was to load her within a reasonable time. The question is, what elements are to be taken into account in answering the question whether she was loaded within a reasonable time or not?

My Lords, the judgment of this House in *Hick* v. *Raymond* (1) appears to me to have laid down very clearly what

(1) [1893] A. C. 22, 32.

are the elements to be considered. It was there held that, "where a bill of lading is silent as to the time within which the consignee is to discharge the ship's cargo his obligation is to discharge within a reasonable time"; and, of course, the same principle applies to loading as to unloading. "And that obligation is performed if he discharges the cargo within a time which is reasonable under the existing circumstances, assuming that those circumstances, in so far as they involve delay, are not caused or contributed to by him." In that case my noble and learned friend Lord Watson states the law thus: "The rule" (that is as to the performance within a reasonable time) "is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably."

Now, my Lords, if that be the true test, it is difficult to see why the natural conditions of a harbour which prevented (having in view the stipulations of this charterparty) the loading except after some delay, are not to be taken into account in determining whether there was unreasonable delay or not. It is said that you are not to take them into account because the stipulation as to loading "always afloat" has been inserted for the protection of the shipowner, and that you are to discuss the question of reasonable time as if there were no such stipulation, and as if you were inquiring what was a reasonable time supposing the charterer had been under no such restriction as to loading. I am entirely unable to accede to any such argument. There is no such thing as reasonable time in the abstract. The question is whether, having regard to all the obligations of the contract, to its conditions, to its restrictions, and to its limitations, more than a reasonable time has been taken in the performance of any one of these obligations in respect of which the parties have not, by their contract, expressed any limit of time for its performance. Therefore it seems to me quite inadmissible to shut

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out any of the provisions of the charterparty which would render the time in certain circumstances longer, when you are inquiring whether more than a reasonable time has been taken. Many cases might be put of stipulations in charterparties. Supposing there were a clause which restricted the loading to daylight, are you to shut your eyes to the fact that the charterparty contains that restriction and to inquire whether more than a reasonable time has been taken, just as you would if there were no such restriction, and as if the loading could go on, as it constantly does, by artificial light? Or again, if a stipulation has been made as to loading in a particular way which will protract the period of the loading, are you to exclude that, because it is one of the terms of the contract, and to inquire whether more than a reasonable time has elapsed as if there were no such stipulation? I can see no reason either in point of law or in point of common sense for thus excluding any of the terms of the contract between the parties.

Now, taking that to be the law, is it here made out that the charterers took more than a reasonable time to load this vessel? It is admitted that the vessel could not by any human being have been loaded, whatever the diligence employed, an hour sooner than she was loaded if she was to be loaded always afloat. Under these circumstances it seems to me impossible to hold that where the obligation has been performed as soon as, owing to the natural circumstances of the port, it could have been performed, the person performing it has taken more than a reasonable time. I think so to hold would be highly unreasonable.

Then it is said that under this charterparty the charterers were bound as soon as the vessel arrived to name a berth where she could lie thenceforward always afloat and take in the whole of her cargo, and therefore there has been default upon the part of the charterers, and so the case is within the exception to which my noble and learned friend Lord Watson alluded in the passage I have just read from *Hick* v. *Raymond*. (1) But where is any such obligation to be found in the charterparty? It is not there in terms—there is no provision to that effect.

(1) [1893] A. C. 22, 32.

If it exists it must be only because that is the reasonable inference to draw as to the intention of the parties from the construction of the whole of the contract. It seems to me impossible to find properly by implication in this contract any such condition. It is obvious that the time of the arrival of the vessel in the port depends largely upon the shipowners—until she has arrived the charterers have no control over her. It is obvious, further, that in a port such as that to which this charterparty related the ship might arrive at a time at which it would be impossible then to name a place where she could lie always afloat, and take in her cargo so afloat; and surely it would be very unreasonable to suppose that the parties had contracted that in a matter largely depending upon the shipowners the charterers should accomplish the impossible; I think that would be an unreasonable and not a businesslike interpretation of such a contract as this. I think it is very probable that if the events which have happened had been contemplated, provisions would have been found in this charterparty which are not there. I am certainly disposed to surmise that these contingencies were not foreseen or not thought of at the time when the charterparty was entered into; but we must construe the charterparty with regard to the circumstances and natural conditions of the harbour, and the terms which the parties have inserted in the charterparty, and we must not by reason of any surmise insert any new conditions. Indeed, I think to suggest the existence of such an obligation under this contract is a mistake. If the charterers, the instant the vessel arrived, named a berth, they would still be liable if they did not load the vessel within a reasonable time. If, when the ship arrives, they delay naming a berth, but yet load within a reasonable time, they are not liable. The obligation is to load within a reasonable time. It may be that by not naming the berth, or not finding the berth when they are bound to find it, the stipulation by which they are bound remains unfulfilled; but it is because they have not complied with that stipulation that they are liable, not because they have not named a berth; that is only one of the elements that may cause delay.

My Lords, it was urged that it would be very hard upon a

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shipowner that his ship might remain idle for a fortnight, or nearly a fortnight, and he might be put to expense on account of the state of the tide in this harbour. That is, very naturally, the shipowner's view. But, on the other hand, may not the same thing be said with regard to the charterer, who cannot dictate, at all events under such a charterparty as this, the actual time when the vessel is to arrive, and who is to be held liable for a lack of water in the harbour, for which he is no more responsible than the other party to the contract?

Therefore I am of opinion that the only question arising in this case is, has it been proved that the obligation, which undoubtedly rested upon the charterers to load this vessel within a reasonable time after she arrived, has not been discharged? If that has not been proved, then the judgment under appeal is correct. For the reasons I have given, I think the appellants have failed to establish any breach of that obligation on the part of the charterers.

I move your Lordships, therefore, that the appeal be dismissed with costs.

LORD WATSON (after stating the facts given above). If the *Carlton* had reached Maryport, as her owners anticipated, on Wednesday, February 24, she would, if her berth had been then available, have been able to lie afloat from the commencement till the completion of her loading; and it is clear that had her loading not commenced until March 16 the whole cargo might have been put on board continuously whilst she was afloat. The appellant company maintain that, under the charterparty, as soon as the *Carlton* arrived at Maryport it was the duty of the respondents forthwith to provide a berth for her in which she could at once and without any delay proceed to take on board her cargo continuously and could remain afloat until her loading was completed and she left the port. I do not think that any such obligation is imposed upon the respondents by the language of the charterparty, which is exceptional; and in construing the terms of that instrument, it appears to me to be legitimate to take into account the fact, which was not disputed, that the character of the harbour of

Maryport was known to the appellants as well as to the respondents. As was pointed out by Rigby L.J., the correspondence produced shews that the owners of the *Carlton* were quite alive to the risk, if not the certainty, to which their ship was exposed of touching and resting upon the ground at some states of the tide. In my opinion, the construction for which they contend is unreasonable and objectionable. It makes the obligation incumbent upon the charterers variable and entirely dependent upon the time at which the *Carlton* might find it convenient or possible to arrive at the harbour. If she arrived about the commencement of a period of spring tides, it might not be difficult to find a berth for her at which she could begin and complete the loading of her cargo, she being during the whole time afloat. On the other hand, if she arrived towards the termination of the same period, it would be simply impossible to provide a berth for her in Senhouse Dock, where, if she began to take in cargo at once, she could remain afloat until her loading was completed.

The charterparty does not contain any provision to the effect that the ship shall "lie afloat" at all times whilst she is in the harbour of Maryport. It merely provides that she is to "load in the customary manner, always afloat." These words, according to their natural meaning, go no further than to impose a qualification of the charterer's right to load, by negativing his right to put cargo on board except at times when the ship is afloat. In these circumstances, I concur in the result which commended itself to the majority of the Appeal Court. I think the *Carlton* was rightly directed to a berth where, if she had chosen to wait, she could have continued afloat until the whole of her cargo was continuously shipped; and that the respondents cannot be held responsible for delay occasioned by natural and physical causes which were beyond their control.

LORD MACNAGHTEN. My Lords, I am of the same opinion. Maryport is a tidal harbour—tables are published shewing the expected height of water for every day of the year. A shipowner may be presumed to know the draught of his own ship

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with the cargo on board which he proposes to carry. It must therefore be taken that the shipowner in this case entered into the charterparty with the knowledge that in the ordinary course of navigation his ship, if she arrived at her destination at certain states of the tide, would be delayed in shipping her cargo, assuming that she was going to ship it (as provided by the contract) "always afloat." The substantial question is, Who is to suffer for that delay—the shipowner or the charterer? There is no special provision throwing the loss on the charterer. The loss has arisen in the ordinary course of navigation. And, therefore, as it seems to me, the shipowner must bear it.

I quite agree with the Court of Appeal in their view of the order which was given to the shipowner to proceed to the berth in Senhouse Dock. It seems to me to have been a proper and reasonable order. It was for the shipowner to consider, having regard to the state of the tides, whether he would go to the berth at once and take in part of his cargo, or wait until he could ship the whole of it continuously, "always afloat." To complete the loading, whether he began it at once or not, he would have to wait till the next spring tides. That, say Mathew J. and A. L. Smith L.J., is an unreasonable time to wait. I cannot understand how it can be unreasonable when it is the period required by the character of the harbour and the laws of Nature.

Having regard to the known accommodation of this harbour and to this contract, it seems to me that it would be most unreasonable to hold that at the time when this vessel arrived the charterers were bound to provide a berth with a depth of water which both parties knew to be physically impossible.

I agree that the appeal must be dismissed.

LORD SHAND. My Lords, I am also of the same opinion.

The port of Maryport is one at which vessels of large draught can only be loaded at intervals, and when high spring tides occur, and, consequently, a vessel of large tonnage arriving at an unsuitable time may have to submit to considerable delay before getting a cargo on board if the owner requires that the loading shall be carried on and completed while the ship

remains "always afloat." It appears to me that those who contract as charterers and shipowners in regard to such a port must alike be held to make their contracts of charterparty with reference to the circumstances and natural condition of the harbour. If they have failed to inform themselves and to provide for circumstances which from the nature and configuration of the harbour may delay the loading of a ship because the requisite depth of water can only be had at intervals when specially high tides occur, they may enter into improvident arrangements and agreements; but this cannot affect the legal construction of the contracts entered into as having reference to a harbour which has known disadvantages.

In the construction of the contract of carriage or charterparty no distinction can be drawn between the charterer who is to supply the cargo and the shipowner who is to load his ship.

In my opinion the legal construction and effect of the charterparty in this case—in which the charterer is by the shipowner restricted as to the loading by the provision that during the loading the ship shall be always afloat—is that after notification that the ship has arrived at the port ready to receive cargo the charterer became bound to furnish the cargo at a suitable berth, when that could be had and within a reasonable time—when having regard to the draught of the ship and the depth of water available the loading could be effected without causing the ship to ground—but that his obligation goes no further. The shipowner has stipulated that his vessel shall be loaded only when she can be kept afloat, and as from the nature of the harbour this can be done only when certain high tides occur, it seems to me to be clear that time lost after the arrival of the ship in waiting for the necessary tides and depth of water must be lost to the shipowner. The charterer does all that is possible, and all that can, I think, be inferred from his obligation under the charterparty, if he provides the cargo as soon as, having in view the nature of the harbour, the loading can be proceeded with and effected without grounding the ship. Accordingly, without again recapitulating the facts which have been already stated by your Lordships, I have only to add that

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the respondent in this case fulfilled his obligation. The contract admitted of being fulfilled in its very terms, although in certain contingencies delay would certainly occur in the loading. I can find no breach of contract on the part of the charterer. He could not, consistently with the shipowner's stipulation that the loading should take place only when the ship was afloat, do more than he did. The unfortunate delay was the result of a stipulation by the shipowner, necessary no doubt for the safety of his ship, but having made that stipulation he must bear the loss consequent on its fulfilment.

The learned judge in the Court of Appeal who differed from the judgment put the case of a delay in the loading which might last for six months or one month under such a charter-party as the present. It is difficult to suppose that any shipowner would make a contract so improvident as to produce this result. But with the utmost deference to the very learned judge who puts this case, I can only say that in such a case the responsibility of the charterer would not in my opinion be thereby enlarged.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 16, 1898.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Parker, Garrett & Holman.*

[HOUSE OF LORDS.]

SAMUEL HEATH & SONS, LIMITED . APPELLANTS; H. L. (E.) 1898 June 21.

AND

CHARLES ROLLASON . . . . . RESPONDENT.

Design—Applicable for Pattern—Registration of Design—"New or Original"—Marking Articles—Statutory Requirements—"All proper Steps"—Patents, Designs, and Trade Marks Act 1883 (*c.* 57) *ss.* 47, 51, 60—*Designs Rules* 1890 *r.* 9.

The term "design" in s. 60 of the Patents, Designs, and Trade Marks Act 1883 was not intended to be used in any technical sense as excluding anything that would ordinarily fall within it; and "pattern" as used in that section might include "shape" or "configuration" or "ornament."

The decision of the Court of Appeal, *In re Rollason's Registered Design*, (1898) 1 Ch. 237, affirmed.

THE respondent Rollason registered in 1894 a design for six coffin-plates under the Patents, Designs, and Trade Marks Act 1883. In his application he stated that the design was "applicable for the pattern." He employed a competent person to make the dies and stamp the plates. The dies were correctly made and stamped upon the plates in every instance except one, and in that case the figure 5 was stamped instead of 3 in the number of the design 232908, and a certain number of plates thus stamped were sold. Upon this error being pointed out the respondent had it corrected. The appellants, who were rival manufacturers of coffin-plates, moved to expunge the respondent's design from the register on the ground (1.) that it was not new or original at the date of the registration; (2.) that articles to which the design was applied had not been marked as prescribed by s. 51 of the Act. Kekewich J. overruled the second point, but ordered the design to be removed, on the ground that it was not new or original. The Court of Appeal (Lindley M.R., Chitty and Vaughan Williams L.JJ.) reversed this decision on the first point, being of opinion that the design was new and original. On the second point they held that the copyright had not ceased under s. 51 of the Act, as the respondent had shewn that he "took all proper steps

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to ensure the marking of the article within the meaning of that section." (1) Upon the present appeal the main contention was as to the novelty of the design—a question of fact which it is difficult, probably impossible, to judge without seeing the respondent's design and the previous design of Sanders from which it was alleged to be taken. The question being one of fact, not law, no more need be said here. Illustrations of the drawings furnished for registration are given in the report below. (1)

Renshaw Q.C. and *W. N. Lawson*, for the appellants, urged the same arguments as were employed in the Court of Appeal; and upon the point as to the copyright ceasing, referred to *Wittman* v. *Oppenheim* (2) and *Johnson* v. *Bailey*. (3)

Rolls Warrington Q.C. and *E. P. Hewitt*, for the respondent Rollason, were not heard.

LORD HERSCHELL. My Lords, this is an application to remove a design from the register, and the sole question on that part of the case is whether the design ought to be removed from the register on the ground that it is not, or was not at the time it was registered, "a new or original design."

The applicant registered a certain drawing to indicate the nature of the design which he claimed to have registered. In accordance with the rules he was required to state the nature of the design, whether it was "applicable for the pattern or for the shape or configuration." He stated in the application that it was to be "applicable for the pattern."

The first question to be considered is, What is the design which the applicant has registered? The class of goods in relation to which it is registered is coffin-plates. In order to ascertain what the design is, one must look at the drawings which the applicant has registered, because they really indicate the design which he seeks to have registered and to obtain protection for. The learned counsel for the appellants has contended that the applicant cannot rest his case upon the circumstance that the centre part of the coffin-plate was made

(1) [1898] 1 Ch. 237. (2) (1884) 27 Ch. D. 260.
(3) (1893) 11 Rep. Pat. Cas. 21.

by him depressed and the borders raised, for two reasons: first, because a depression of the centre would be a matter of "shape" and "configuration" and not "pattern," and next because the drawings do not indicate that the centre is to be depressed. My Lords, these words "applicable for the pattern or for the shape or configuration or for the ornament thereof" are to be found in the Act only in the interpretation clause. All that s. 47 and the following sections deal with is the question of "design"; that is the word used and the only word; but the word "design" is interpreted by the interpretation clause, s. 60. In my opinion, the object of that interpretation clause was to make the word "design" as extensive as it reasonably ought to be. It was not intended to draw the distinction suggested as a sharp, hard and fast distinction between the design being "applicable for the pattern," or "for the shape or configuration," or "for the ornament." I do not think you can say that "pattern" as it is used in that section necessarily and always excluded the shape or configuration, and that nothing could be included in "shape" or "configuration" which might not fall to be considered under "pattern"; or again, that the "ornament thereof" might not be a part of the pattern, and included in certain cases within the word "pattern." The words have not a sharply defined meaning; but the intention is to include any design, because the word is repeated, "any design" applicable to any class of goods, and whether "applicable for a pattern," or "for the shape or configuration or ornament," or some or all of them. The object was to use words which would include everything which would ordinarily fall within the word "design," and to shew that the word "design" was not intended to be used in any technical sense as excluding anything that would ordinarily fall within it.

My Lords, I should mention that in the first schedule to the Act—Form E—which contains the form of application, in which form s. 47, sub-s. 2, prescribes that the application is to be made, there is nothing said about the design being applicable for the one matter or the other. All that the applicant is required by s. 47 to state is "the nature of the design." Then certain rules were made under the statute,

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and in those rules a new form is given, or rather the old form of the statute is accompanied by a note which interprets "the nature of the design" as including such matters as these: "such as whether it is applicable for the pattern, or for the shape"; the words "configuration" and "ornament" are left out. Now, I am not going here to say what is the meaning and effect of that rule or that requirement, or what is the effect of an application which states that it is applicable for the pattern, or what is the interpretation of "pattern." It is not necessary for the purposes of this case to do so, and I think it is not very easy to say what meaning and effect the rule was intended to have, or what its operation would be. This, certainly, I am very clear about, that it does not in terms purport to import a condition which will limit the effect of the design when registered, and that there being no such condition limiting the effect of the registration in the statute, it could be added by the rules only if that were done in clear and unmistakable terms. Whether it would then have the operation contemplated I need not discuss, because certainly the rule does not purport to insert as a condition that the person registering the design is to be limited to some part of his design or to some effect of his design. It is not necessary to say more upon the present occasion.

My Lords, to my mind the word "pattern" as used here by the applicant in relation to this subject-matter would include everything which would go to make up the "design." Certainly the word "pattern" very often includes, as I have said, what you might ordinarily speak of as "ornament," or an element of it may be certain "shapes" and "configurations" in parts of the design. In the present case I do not find it necessary to say whether the drawings do indicate this depressed centre or not, because in my judgment this may be upheld and ought to be upheld as a new or original design whether it was intended (probably it was) that there should be a depressed centre or whether it was not so intended. No doubt the ornamentation or the pattern of the applicant's plate bears a certain resemblance to the plate which has been called Sanders', which was previously known. There is a shell pattern in each corner of

the plate in both cases; but the two designs are not to my mind the same. They may produce upon the eye a different effect, and the one may be thought to be a more attractive design than the other. It is not possible to give reasons for the conclusion at which one arrives in a case of this sort—you cannot analyze the difference. You might find many differences and yet come to the conclusion that the designs were the same. You might find but few differences and yet come to the conclusion that the designs were different. In the present case, looking at the two designs and comparing the one with the other without going into any details, I think the applicant's was a new and original design such as to entitle him to registration under the Designs Act. Of course in the present day it is very difficult to register any design that does not contain in it something which has been done before. Very often a very successful design may be one in which the difference from previous designs can on analysis be shewn to be very slight, where nevertheless the result is to make the one so much more pleasing than the other that it is a successful design. Whilst on the one hand we certainly ought not to give protection to a design in which the variations are trivial and unimportant so that it is substantially the same design as one already registered or known, on the other hand we ought not to refuse it where the design is practically a different one which may be more attractive. Although I quite admit that it is a matter on which opinions may differ, different minds being differently affected in considering a case of this sort, nevertheless I have come to the conclusion that the Court of Appeal were right in saying that this was a "new or original design." Certainly I am not prepared to differ from the conclusion at which they have arrived.

My Lords, so far that would defeat the appellants' claim to have this design removed from the register unless they are right in saying that under the 51st section of the Act the copyright in the design has ceased because before delivery of the articles to which the registered design had been applied the proprietor of the design had not caused the articles "to be marked with the prescribed mark or with the prescribed word or words or figures

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denoting that the design is registered." In the present case, there being six figures, in some instances articles were sent out with one of the figures wrong—that is to say, a 5 had been put upon the article in place of the figure 3. My Lords, the section by its concluding words leaves an opening to prevent the operation of the section in full stringency, because it provides that the right shall not cease if all proper steps have been taken by the proprietor to insure the marking of the article. In interpreting these concluding words I think it is necessary to bear in mind the object of the section and to take into account, too, what the nature of the omission was. The object of the section as stated in plain terms is to "denote that the design is registered"—that is to say, to give warning to the public that they are not entitled to copy it by reason of registration. Of course, if there is nothing to give that notice to the public the proprietor would need to make out a very strong case to excuse himself under the concluding words of the section, because he has failed to do that which was essential to the very purpose of the provision contained in the section, namely, to indicate to the public that the design was a registered one. Even in that case he might escape the loss of his design by making out a case which would shew that it was not due to any fault of his; but it seems to me that the case to be made out would then need to be much stronger than if there were merely some error in complying with the exact requirements of the section as to the figures or words to be put upon the article if there were such compliance as plainly to indicate that the design was a registered one. That is the class of case with which we are dealing here. The public would be equally warned of the registration of the design whether out of these six figures one was a 3 or a 5.

My Lords, in the Scottish case which Mr. Renshaw cited (1), the result had been by using a mould until it was worn out to produce no marks at all upon the article to shew that it was registered. I think it might well be said to the proprietor of a design, "It is your business to provide moulds—you know that moulds wear out after a time; it was your business to see that under such circumstances as these you did not continue to

(1) *Johnson* v. *Bailey*, 11 Rep. Pat. Cas. 21.

use a mould which had ceased to serve the purpose of indicating to the public that the article was made according to a registered design." But, in the present case, has the proprietor established that he took all proper steps to insure the marking of the article? He had given instructions to a competent manufacturer to make him the necessary dies. It is not suggested that the instructions were not such as, if followed, would have made the dies with the proper numbers. They were so made in seven cases out of eight, but, by a mistake of one of the workmen who made one of them, a 5 was put in the place of a 3—a very common mistake, and one not unlikely to have occurred. But, having employed a competent man to make these dies, and then having used them for stamping the article which he sent out, has he not "taken all proper steps to insure the marking of the article"? It seems to me that he has, and that this is just one of those cases which the concluding words of the section were intended to meet, and it would be an extremely hard measure if, on account of a trivial mistake of that description, the right in the design were to cease. On that point all the judges are agreed—the learned judge before whom the case came in the first instance, and those who heard it in the Court of Appeal.

For these reasons I move your Lordships that the judgment appealed from be affirmed and the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion on both points, and concur in the judgment proposed.

LORDS MORRIS and SHAND concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, June 21, 1898.

Solicitors for appellants: *Stibbard, Gibson & Co., for Rowlands & Co., Birmingham.*

Solicitors for respondent: *Preston, Stow & Preston, for Ansell & Ashford, Birmingham.*

[HOUSE OF LORDS.]

H. L. (E.) 1898 July 4.

WHEELER AND OTHERS . . . . . APPELLANTS;

AND

HUMPHREYS AND OTHERS . . . . . RESPONDENTS.

Will—Construction—Hotchpot Clause.

A father having one son and one daughter covenanted with the trustees of his son's marriage settlement that his executors would pay them 10,000*l.* to be held on trust for the son for life, with remainder for the son's wife for life, with remainder as to the capital for the issue of the marriage; in the event (which happened) of there being no child the capital to be held in trust for the father absolutely. The father died having by his will given the residue of his estate in trust for his son and daughter in equal shares. The will provided that all sums which the testator had covenanted to give to or with any child on his or her marriage should, in default of any direction to the contrary, be taken in or towards satisfaction of the respective share of such child, and should be brought into hotchpot and accounted for accordingly. After the father's death his executors paid 10,000*l.* out of his estate to the trustees of the son's settlement, appropriated a like sum to the daughter, and divided the residue equally between the son and the daughter. The son having afterwards died leaving a wife and without issue, the daughter claimed a moiety of the 10,000*l.* fund:—

Held, (1.) that the benefits secured for the testator's son, his wife and children, under the testator's covenant in the son's marriage settlement were sums which the testator had covenanted to give to his son on his marriage, within the meaning of that expression in the hotchpot clause; (2.) that the whole beneficial interest in the 10,000*l.* fund must be treated as appropriated to the son's share at the date of the division of the estate, the ultimate interest being appropriated and allotted to the son under the direction for the equal division of the testator's estate between his two children, and the prior interests being brought into account as part of the son's share under the hotchpot clause; and that the son's executors were therefore entitled to the whole of the 10,000*l.* fund, subject to the life interest of the son's widow.

The decision of the Court of Appeal, *In re De Cosier*, *Humphreys* v. *Gadsden*, [1897] 1 Ch. 325, affirmed.

The following statement of facts is taken from the judgment of Lord Macnaghten.—

The testator, R. A. Cosier, in 1886, when he made his will, was a widower with only two children—a son and a daughter—both of whom were then married.

By his will he directed his executors and trustees to convert his whole estate into money and to stand possessed of the clear residue in trust for his two children in equal shares. After settling the daughter's share and giving his trustees various powers, including a power specifically to appropriate and allot any part of his estate in or towards satisfaction of the respective shares thereinbefore given or settled, he declared his will as follows: "Provided also, and I declare that any and all sums of money, annuities, or annual sums and property which I have already covenanted or agreed to give or which I may hereafter covenant or agree to give to or with any child of mine on his or her marriage shall, in default of any direction to the contrary in writing under my hand, be taken in or towards satisfaction of the respective share of such child or the person or persons claiming under or in substitution for her or him under my will and shall be brought into hotchpot and accounted for accordingly."

In the case of the daughter there was nothing to be brought into hotchpot. In the case of the son the testator had in 1885 covenanted with the trustees of the son's marriage settlement that his executors would, within six months after his death, pay to them the sum of 10,000*l.*, to be invested and held upon trust for the son for life, with remainder for the son's wife for life, with remainder as to the capital for the issue of the marriage. In case there should be no child (as in the event happened) the capital was to be held in trust for the settlor absolutely.

The testator died in 1886 and his executors paid 10,000*l.* in accordance with the covenant to the trustees of the son's marriage settlement, set apart a like sum for the daughter's share, and divided the clear residue equally between the son and the trustees of the daughter's settlement. In 1896 the son died without issue, his wife surviving. A summons having been taken out by the son's executors to determine who was entitled to the 10,000*l.* fund, Chitty J. made an order declaring that, subject to the life interest of the son's widow, it was part of the testator's residuary estate and divisible in moieties between the son's estate of the one part and the testator's daughter and her

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children of the other part. The Court of Appeal (Lindley M.R., A. L. Smith and Rigby L.JJ.) discharged this order, and made an order declaring that the executors of the son's estate were entitled to the whole of the 10,000*l.* fund subject to the life interest of the son's widow. (1) Against this decision the testator's daughter and her children brought the present appeal.

The arguments appear in Lord Macnaghten's judgment.

Farwell Q.C. and *J. G. Wood* for the appellants.
Levett Q.C. and *Edward Ford* for the respondents.

The House took time for consideration.

July 4. LORD MACNAGHTEN. My Lords, I listened respectfully to the learned counsel for the appellants. I have since had the opportunity of reconsidering arguments which at the time I was unable to follow. But I must confess that I am still unable to understand what the difficulty is. The case appears to me to be so very simple, though it is perhaps a little obscured by the line of argument adopted in the Court of Appeal. [His Lordship stated the facts above set out.]

The clear residue of the testator's estate without providing for the sum of 10,000*l.* amounted, roughly speaking, to 52,000*l.* Taking it at that sum, how ought the amount to have been dealt with?

The first question seems to be, what was the effect of the father's covenant? What did it give to the son? It gave him a life interest in the investments representing the 10,000*l.* Then it gave a life interest to the son's wife, and further, it gave the capital to the issue of the marriage in the event of there being any issue to take. For the purposes of the will it seems to me that it would be only reasonable to hold that whatever was coming to the son's wife and the children of the marriage under the covenant was a marriage gift to the son. What was given was in substance given to the son to be enjoyed by him by means of a settlement on himself, his wife, and children. But there the gift to the son ends. The interest which the father retained or reserved was not given to the son

(1) [1897] 1 Ch. 325.

in any sense. It would therefore have been wrong to require the son to bring the whole 10,000*l.* into hotchpot in every event. And the testator has not done so. The learned counsel for the appellants did not contend that the 10,000*l.* was to be brought into hotchpot as a gift to the son. They argued that the whole fund was to be brought into hotchpot as a gift *with the son*. That, if I may venture to say so, is the mistake which the learned judge of first instance makes. "The truth is," he observes, "that the testator has not referred in this hotchpot clause to the trusts of the 10,000*l.*, but what he has directed to be brought into account is the 10,000*l.* which he gave *with his son*." Now I cannot agree with that observation. The reference in the will is, I think, a reference to the trusts of the 10,000*l.* so far as they enured for the benefit of the son. Surely the testator must have been referring to the beneficial interest in the gift, not to the legal ownership of the fund which was designed to protect that interest. A gift is a gift whether it be given directly or given through the medium of a trust. What the donor keeps back is no gift. Then I do not understand the expression "given with any child of mine" as applied to a provision on behalf of a son. It obviously applies to a provision on behalf of a daughter. You give your daughter in marriage, and you give a portion with your daughter. That is a common expression, and correct enough, because the portion is given to or for the benefit of the person to whom the daughter is given. In the marriage service the question is asked, "Who giveth this woman to be married to this man?" A corresponding question applied to the other contracting party, even nowadays, I presume, would be thought inappropriate. It appears to me that it would be equally inappropriate to refer to money settled on behalf of the intended husband as given *with* him. The contention on the part of the appellants involves a contradiction. It requires a legatee to give credit for something which never was his, and then it treats that very thing as belonging absolutely and for all purposes to the testator himself. This contention seems to have had its origin in a misapplication of the testator's words. Not that that misapplication can really make any difference. The contingent interest reserved by the

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settlor is no more given *with* the son (if anybody prefers that way of looking at it) than given *to* the son. It was not given at all. The settlor kept it.

The Courts below agree in thinking that the sum of 10,000*l.* which the testator covenanted to pay to the trustees of his son's marriage settlement must be brought into account under the hotchpot clause en bloc and without reserve. There, however, they part company. In the first Court it was held that the hotchpot clause could have no further operation. The contingent interest under the ultimate trust in the settlement remained the father's property; as such it would have to be divided equally between the son and the daughter when it fell into possession; the result was unexpected but inevitable. The Court of Appeal are more fortunate in finding a way of escape. By inverting the hotchpot clause they arrive at a correct result. The whole fund, they say, must be brought into hotchpot by the son. It has therefore to be taken towards satisfaction of his share; the direction that it is to be so taken implies a gift, and therefore whatever interest the father retained in the fund is given to the son by the hotchpot clause, as Rigby L.J. thinks, or, as the other members of the Court held, by the conjoint operation of that clause, and the gift in the earlier part of the will.

Now I must say I cannot follow this reasoning. It seems to me plain that the testator's reversionary interest in the fund cannot come under the operation of the hotchpot clause. Nothing was to be brought into hotchpot but what the testator had covenanted or agreed to give. The hotchpot clause is in the common form. The clause must have its ordinary effect.

The simplest way of looking at the matter is to put oneself in the position of the executors when they came to divide the estate. They had 52,000*l.* in hand and no liability to meet but the claim of the settlement trustees. The first thing to be done was to pay the trustees. The trustees got their 10,000*l.* Against that a like sum was set apart for the daughter's share. I pause there, for the division of the rest of the estate cannot give rise to any difficulty. The surplus, whatever it is, may be disregarded for the purpose of considering the present question.

I ask what is the result of what the executors have done so far? Equality if the testator's interest under the ultimate trust has been appropriated to the son—inequality if that interest is to be regarded as still the father's property. If that mistake is made the daughter has certainly received too much. As no one suggests, or has ever suggested, that the beneficial interests under the prior trusts are not to be brought into hotchpot, it is obvious that the daughter has received too much by the exact amount or value of the testator's reversionary interest. How is the mistake to be set right? Simply by doing now what ought to have been done before anything was set apart for the daughter. You must specifically appropriate and allot to the son's share the testator's contingent reversionary interest under the ultimate trust. But that is to be done, not under the hotchpot clause, but under the plain directions in the earlier part of the will. It is the only way to effect an equal division between the son and the daughter. Whenever the interest of a legatee, together with the interest, if any, of the testator in a particular fund or a particular property, exhausts the whole beneficial interest therein and the legatee has to bring his interest into hotchpot, the appropriation of the fund or property in or towards satisfaction of the legatee's share or legacy under the will (if such appropriation be in accordance with the will) necessarily involves bringing the legatee's interest into hotchpot, and at the same time deals with the testator's interest, if any, in conformity with his directions in regard to his own property.

The son is now dead, without issue, and the whole of the 10,000*l.* belongs to the son's estate absolutely, subject only to the life estate of his widow.

The result of the view put forward on behalf of the appellants is certainly startling. Whereas the testator directed that his residuary estate should be divided in equal shares between his two children, the son gets 10,000*l.* less than the daughter. The result might have been more startling still. The residuary estate, without providing for the 10,000*l.*, might have been only 20,000*l.* That is an event which the testator seems to have contemplated as at least possible, because he directs that what

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he had covenanted to give to his son should be taken either towards satisfaction or in satisfaction of his son's share under the will. The son's wife might have died without issue in her husband's lifetime, and then, according to the view of the appellants' counsel, the testator's endeavour to produce equality would result in this—the son living and in a position to marry again would get 5000*l.*, and the daughter would carry off 15,000*l.* Suppose, further, that the bequest to the son had been a definite sum of 10,000*l.* instead of being a share of residue, and suppose the ultimate residue had been given to someone else, an eldest son for instance, the son who was advanced in the testator's lifetime living and in a position to marry again would have taken nothing but a life estate.

I agree with Sir Nathaniel Lindley, M.R., that such a result does suggest that there must be some error somewhere. But I desire to rest my judgment on the plain language of the will without putting any strained construction on any words in the hotchpot clause or giving it a peculiar or unusual effect.

I think that the appeal must be dismissed with costs.

My Lords, I am desired by the Lord Chancellor to say that he has read this judgment and concurs in it. Lord James of Hereford also concurs. I therefore move that the judgment appealed from be affirmed and the appeal dismissed with costs.

LORD MORRIS. My Lords, I also have read the judgment and concur in it.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 4, 1898.

Solicitors for appellants: *Flower, Nussey & Fellowes.*
Solicitors for respondents: *Beyfus & Beyfus.*

[HOUSE OF LORDS.]

THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF PRESTON . . . . . } Appellants;

AND

BIORNSTAD AND OTHERS . . . . . Respondents.

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1898
July 4.

THE "RATATA."

Admiralty—Damage—Towage—Contract to exercise reasonable Care and Skill—Port and Harbour Authority.

The appellants undertook for payment to tow the respondents' vessel with others by hired tugs up a tidal river, to lighten the respondents' vessel if necessary, and to conduct the whole operation of the towage upon a certain tide, including the arrangement of the time and order of procession, the river being too narrow for two vessels to go abreast or pass one another. The tug towing the leading vessel was so slow and inefficient that the respondents' vessel, which was the last in the line, was stranded on the ebb tide and damaged:—

Held, that the appellants were bound to exercise reasonable care and skill in the conduct of the towage, and that, there being evidence of failure in that respect, the respondents were entitled to sue the appellants for damages.

The decision of the Court of Appeal, [1897] P. 118, affirmed.

The following statement of facts is taken from the judgment of the Earl of Halsbury L.C.:—

The respondents are the owners of a Norwegian barque called the *Ratata*, and they sue the mayor, aldermen and burgesses of the borough of Preston for damage caused to that vessel by the grounding of it in the River Ribble on July 24, 1895.

The corporation of Preston are the port and harbour authority for the port and harbour of Preston under the Ribble Navigation Act, 1883 (c. cxv.), and, besides filling that character, they have the right to make contracts for towage of vessels using the port of Preston, and to license other persons to exercise the same business. It is important to bear in mind the two capacities filled by the corporation. It appears that the port

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of Preston is a considerable distance from the sea, and the ordinary course of business is that the harbour-master, who appears to act in a double capacity, arranges the time when vessels shall be towed up the river during the time that the state of the tide allows them to reach their destination in safety. The width of the river is such that when there are more vessels to be towed up on the same tide they must go in line one after the other.

On the occasion on which the accident arose the directions as to the time of departure were given in ordinary course by the harbour-master. The *Ratata* was towed by a steam tug, and two other vessels started to accomplish the same end, namely, the arrival at Preston during the same tide, before the ebb should create any danger of grounding. The *Ratata* was placed last of the line of ships, and according to the evidence there should have been no difficulty in arriving at the port before the tide should ebb. The *Vixen* was the name of the steamer which was towing the foremost vessel, and for some reason the *Vixen* was unable to proceed at the ordinary rate at which it was expected and intended to proceed. The result was that the *Ratata* grounded before arriving at her destination, and received considerable damage in so doing. The action was brought to recover the damage incident to this misfortune. The contract of towage was preceded by a correspondence, which in substance invited the owners of the *Ratata* to come to the port, but undertaking to lighten the ship, if it should be proved to be necessary, at the expense of the corporation.

Sir F. Jeune, President of the Admiralty Division, held upon the evidence that the defendants were not liable. This decision was reversed by the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.), and a decree was pronounced in favour of the plaintiffs' claim for damages, subject to a reference as to to the amount. (1) Against this decision the defendants brought the present appeal.

March 24, 29. *Joseph Walton Q.C.* and *Frederick Laing* for

(1) [1897] P. 118.

the appellants. The appellants have not been guilty of any breach of contract or duty from which damage has ensued to the respondents. There was no undertaking that there should be no breakdown or delay with the vessels which preceded the *Ratata*. If the vessel which towed the *Ratata* had broken down the defendants might be liable, but they are not responsible to the plaintiffs for the slow progress of another vessel's tug. Their contract with the plaintiffs was simply to tow the *Ratata*, and they are not responsible for the negligence (if any) which caused the delay. The masters and crews of the tugs were not the servants of the corporation; and in like circumstances it has been held that the owners and not the hirers of the tug are liable in damages for negligence on the part of master or crew: *Cuthbertson* v. *Parsons* (1); *Dalyell* v. *Tyrer*. (2) The delay was not proved to have been caused by any want of skill or care on the appellants' part; it was unexplained, and it was for the plaintiffs to give evidence and prove their case. The appellants are not liable for unforeseen contingencies.

Robson Q.C. and *H. Stokes* for the respondents. The appellants contracted to take the *Ratata* up the river on a particular tide, and by the default of their agents they have not fulfilled their obligation. The harbour authorities organised the proceedings and the order of the vessels to be towed. The person responsible is he who had the control of all the operations of which the towage of the *Ratata* was a part: *Donovan* v. *Laing* (3), per Bowen L.J. It was the appellants' duty to keep the water-way clear, and to provide against contingencies—one of which was the possible inefficiency of any of the preceding tugs—which might interfere with the *Ratata's* progress. They had the hiring of the tugs and were bound to see that the towage was efficiently conducted. If the delay was caused by something for which the appellants are not responsible it was for them to prove the cause.

Joseph Walton Q.C. in reply. The obligation on the

(1) (1852) 12 C. B. 304. (2) (1858) E. B. & E. 899.
(3) [1893] 1 Q. B. 629, at pp. 633-4.

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appellants was only to use reasonable care, and they have done so.

The House took time for consideration.

July 4. EARL OF HALSBURY L.C. (after stating the facts above given). My Lords, no written contract between the parties has been put in evidence, but your Lordships are invited to infer what the contract was from the ordinary course pursued between shipowners and contractors for towage. Looking at the facts, I should infer that, while on the one hand there is no warranty by the contractors that the vessel shall arrive in time to avoid grounding, on the other hand, I think it is clear that they undertook to exercise reasonable care and skill in the performance of the obligation which they have taken upon themselves for hire and reward in conducting the business of the towage to its consummation. Looking at the nature of the thing to be done, I should say they were bound to have reasonable knowledge of the state of the tide, inasmuch as they are to give the signal for the starting of the operations; reasonable care and skill in conducting the operation itself, where, as in this case, a number of vessels have to be brought up during the same tide; and reasonable care in providing adequate steam power to accomplish the object in question.

It appears to me that in this case it is made out that the corporation as the contractors for towage failed in the contract obligation which they undertook, and I think the plaintiffs were entitled to complain that in the combined operation the defendants were conducting either, firstly, they did not lighten the ship sufficiently, or, secondly, they did not place the *Ratata*, considering her draught as lightened by them, first in the line, or, thirdly—and on this matter most reliance was placed at the trial—that they supplied an inefficient steamer to the leading vessel, the necessary effect of which was to delay the *Ratata*, which could not pass or go abreast of the vessel thus made to proceed too slowly, and the catastrophe undoubtedly did arise from the unusual and abnormal slowness of the *Vixen*.

It is said that the *Vixen* was not the property of the corpora-

tion, but was only hired by it for the occasion. It appears to me that that consideration is immaterial. The *Vixen* was engaged in what I have called the "combined operation," an operation which is necessarily combined by reason of the circumstance that the river will not permit two vessels to go abreast. If the corporation put an inefficient tug at the head of the line, it follows that the effect of that inefficiency of the leading tug will involve the consequences not only to the vessel that that tug itself is drawing, but to all the other vessels that follow it. Indeed, it was but faintly contended that if the vessel had belonged as property to the corporation the corporation would not have been liable for the inefficiency of the tug which they provided.

It was said that the corporation were not liable for a chartered tug; but this chartered tug was under the general direction and control of the corporation. It was performing corporation work for which the corporation was to be paid, and it appears to me that the ownership of the tug in the sense of its ultimate ownership is immaterial. For the time during which this contract business was being performed it was the tug of the corporation, and its inefficiency was an inefficiency for which the corporation, as contractors for towage with reasonable care and skill, were responsible.

But it is then said that the plaintiffs should have given evidence to shew that the *Vixen* on this occasion was inefficient and should have proved the cause of its inefficiency, which might, peradventure, be some cause for which upon the contract in question the corporation would not have been responsible. My Lords, I am of opinion that this is altogether erroneous. The fact that it was an inefficient tug on this occasion is proved by the defendants themselves, when they shew how on other occasions it had properly and efficiently performed its functions. If it was suggested that it was some extraordinary and unusual event, and as this was not a contract of warranty the defendants would have been entitled to insist on that as a defence, it was for the defendants to prove it. Two causes only are suggested in the course of the trial: one, the badness of the coal—itself supplied by the corporation;

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the other the unskilfulness or neglect of the stokers. In either event, as it appears to me, the corporation cannot avail themselves as against the owners of the *Ratata* of the unskilfulness of their tug or the bad material, the use of which placed the obstruction in the way of the *Ratata* and was the cause of the calamity.

Under these circumstances I am of opinion that the judgment of the Court of Appeal was right, and that this appeal ought to be dismissed with costs; and I move your Lordships accordingly.

LORD WATSON. My Lords, I concur in the judgment which has been delivered by the Lord Chancellor, and have nothing to add.

LORDS MACNAGHTEN and MORRIS concurred.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 4, 1898.

Solicitors for appellants: *Bird & Hamer, for H. Hamer, Preston.*

Solicitors for respondents: *Stokes & Stokes.*

[HOUSE OF LORDS.]

THE OWNERS OF THE "GLENGYLE," HER CARGO AND FREIGHT . . . } APPELLANTS;

AND

THE NEPTUNE SALVAGE COMPANY, LIMITED, AND OTHERS, OWNERS OF THE "HERMES" AND "NEWA" . } RESPONDENTS.

H. L. (E.) 1898 July 12.

THE "GLENGYLE."

Admiralty—Salvage—Amount.

In reviewing an award for salvage made by the judge of the Admiralty Division and affirmed by the Court of Appeal this House will not interfere with the amount awarded unless it appears that the established principles have not been satisfactorily applied.

The decision of the Court of Appeal, [1898] P. 97, affirmed.

THE *Glengyle*, worth with her cargo and freight over 76,000*l.*, in August 1897 was seriously damaged by collision in the Straits of Gibraltar and began to sink. For the purpose of this report it is enough to say that the *Glengyle* would certainly have gone to the bottom but for the prompt assistance rendered by the *Hermes* and the *Newa*, two steam-tugs belonging to two foreign companies, built and employed solely for salvage purposes, equipped with divers, pumps and other special appliances, and kept at Gibraltar always ready for action at the shortest possible notice. These tugs arrived just in time to save the *Glengyle*, and succeeded with difficulty and risk to themselves and their crews in towing her into safety. The values of the *Hermes* and *Newa* were 22,000*l.* and 20,000*l.* respectively. In an action for salvage brought by the owners of the tugs Barnes J. awarded 19,000*l.* in equal moieties between the two tugs, and this decree was affirmed by the Court of Appeal. (1) No principle whatever was in contest upon this appeal, which was heard with the assistance of two nautical assessors—absolutely nothing but the amount of the salvage.

(1) [1898] P. 97.

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The circumstances of the salvage are set out at length in the report below.

Sir R. T. Reid Q.C. and *Aspinall Q.C.* (*Butler Aspinall* with them) for the appellants contended that the sum awarded was too large, being the largest ever known, and compared it with sums awarded in other cases.

Joseph Walton Q.C., *F. W. Raikes Q.C.* and *Dawson Miller* for the respondents were not heard.

LORD HERSCHELL. My Lords, in the present case there is no contest with regard to the facts. The statements as they appear in the statement of claim are admitted, and it is on the basis of those statements being in accordance with the facts that this case has been decided, and is now to be decided. The services are admitted to have been meritorious. It is not denied that a large award was under the circumstances justly to be made in favour of the respondents. The learned judge in the Admiralty Court has awarded a sum of 19,000*l.* From that award there was an appeal to the Court of Appeal, and the Court of Appeal came to the conclusion that the award was not so exorbitant or so manifestly excessive that it would not be just to affirm it. That is the language adopted by the Privy Council in the case of *The Amérique* (1) as the test of the functions of the Court of Appeal in a case of this description.

My Lords, the Court of Appeal having arrived at that conclusion of refusing to disturb the award of the learned judge of the Admiralty Court, this appeal is now before your Lordships' House, and, speaking for myself, I must say I think it would need a case exceptional and extraordinary to induce this House to interfere with an award made by the learned judge of the Admiralty Court and affirmed by the Court of Appeal. Unless one were to see that some of the elements which ought to be taken into account had been overlooked or that an altogether exaggerated importance had been given to some of the elements of the case—in short, that the principles which are recognised and settled had not been satisfactorily and truly and

(1) (1874) L. R. 6 P. C. 468.

properly applied—I think this House would not interfere with the award.

Now, my Lords, in the present case there is no suggestion made that any element has been overlooked or that any element has been improperly introduced, or that to some specific element an altogether abnormal and exaggerated importance has been given. It may be that the learned judge has not weighed each of them as everybody else would weigh them. I do not suppose that you would ever find in a case of this description an absolutely unanimous consensus of opinion as to the weight which ought to be allowed to each element, nor would you find, probably, any two persons, looking at the case separately, agreed as to the amount which ought to be awarded. At the best, in cases of this description all that can be done is what may be called rough justice. It is impossible nicely and accurately to measure in relation to the risks run and the services rendered the sum which ought to be awarded by the Court. My Lords, in the present case the amount is large, and it may be that it is larger than each of the members of this House who have heard this appeal would have given if it had been left to his individual judgment. I do not say that it is so; all I say is, that in my opinion it is not so exorbitant or so manifestly excessive that we ought to interfere with the conclusion which has been arrived at.

The case is a somewhat peculiar one, because the vessel would no doubt have gone to the bottom but for the assistance rendered by the respondents' two tugs or salving steamers: that seems certain; and that the vessel was saved from imminent peril at a risk to the steamers seems also certain, and at some risk—it may not have been a heavy risk—to the lives of those who were navigating them. Moreover, the destruction of the vessel seems to have been certain unless those steamers had been waiting ready at any moment to respond to a call if there was a vessel in distress. They were steamers of considerable value—the one worth 22,000*l.* and the other worth 20,000*l.*—with large crews on board (twenty-three in the case of the *Hermes*) with special apparatus ready to be used for salvage purposes, with pumps of unusual power and other

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Lord Herschell.

appliances—with those always ready however long a time might elapse between one call and another. My Lords, I think it is impossible to exaggerate the importance to shipping of the presence at a port like Gibraltar of vessels like these always ready to render the services which they were called upon to render in this case. It is not like the case of a vessel in distress at sea which is fallen in with by other vessels any one of which would probably be as able as any other to render the required service, the only difference being that the one ship has arrived before the others. It is a case where, but for the presence of these vessels specially prepared for the service, ready for the service at the moment, a vessel would have been lost (as this would have been) but owing to these vessels being ready is saved. Here the vessel and cargo saved are of great value, 76,000*l.*; and I ought to add this, that the crews of the salving steamers were not the ordinary crews of a tug for towage purposes—they were crews specially skilled in salvage work who were capable of doing the work of divers and performing various other operations which were necessary if vessels were to be effectually salved. All these were elements to be taken into account, and having been considered, and considered together, the conclusion was arrived at that 19,000*l.* should be awarded for the salvage.

For the reasons I have given I think a case has not been made out for interference, and I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, I also am of the same opinion.

LORD SHAND. My Lords, I do not propose to add anything to what has fallen from my noble friend on the woolsack as to the peculiar nature of the services here rendered. It appears to me that the considerations which guided the learned judge in the Court of First Instance were all properly taken into view by him. I attach, as his Lordship has done, very great importance to the circumstances that these ships had crews specially fitted for the service—that they had captains

who were apparently familiar with several languages in order that they might perform these services thoroughly, and that they had appliances which were suited for saving vessels in distress. All those are considerations which ought to weigh with the Court in assessing the amount which ought to be given by way of salvage. In the case of merchant vessels they seek their profits in earning freights. In the case of tug-ships which may perform similar services they also have their return in the ordinary way for their towage services. It is a consideration in the present case that the only profit or return which the owners of such ships as performed the salvage services here can have for saving valuable vessels is the amount they may get awarded to them for services such as these.

My Lords, as to the amount awarded by the learned judge, I rather gather from the opinions delivered in the Court of Appeal that their Lordships were of opinion that the sum that had been given was, to say the least of it, full and large. I think there are indications in the opinions of the learned judges that each of them, speaking for himself, would not have given so much if he had been sitting alone in the first instance when this case was disposed of. I confess that is my state of mind also. If I had been sitting originally to dispose of this case I should not have given so large a sum as the learned judge has given. But, on the other hand, I am of opinion with your Lordships that the sum awarded is neither so exorbitant nor so manifestly excessive in amount that the House ought to interfere with it, although I think it borders upon such an amount.

On that ground I agree with your Lordships in thinking that the appeal should be dismissed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 12, 1898.

Solicitors for appellants: *Hollams, Sons, Coward & Hawksley.*
Solicitors for respondents: *W. A. Crump & Son.*

[HOUSE OF LORDS.]

H. L. (E.) 1898 *June* 16.

COMBER . . . . . APPELLANT;

AND

LEYLAND AND BULLINS . . . . . RESPONDENTS.

Practice—Service of Writ out of Jurisdiction—Contract "which, according to the terms thereof, ought to be performed within the Jurisdiction"—Order XI., r. 1 (e).

In order to allow service of a writ out of the jurisdiction under Order XI., r. 1 (*e*), the contract for breach of which the action is brought must be one which, according to the terms thereof, must be performed within the jurisdiction. Leave cannot be given in a case where the contract may be performed either within or out of the jurisdiction.

Where the defendant abroad contracted to sell goods sent to him and remit the proceeds to England by bills, and he sold the goods and kept the proceeds:—

Held, that since his contract could all be performed abroad, no writ could be issued here for service abroad, either for breach of contract or for money had and received.

The decision of the Court of Appeal reversed.

THE appellant carried on business in Pernambuco. The respondents were bankers in Liverpool. Johnston, Pater & Co., merchants in Pernambuco, imported goods into Brazil by arrangement between themselves and the appellant and the respondents. The terms of this arrangement were in dispute, but it appeared from the affidavits that the respondents having made advances and payments on shipments of goods from England to Brazil for account of Johnston, Pater & Co., sent the bills of lading inclosed in covering letters to the appellant in which the respondents directed him to hold the bills "and the property represented thereby, also the net proceeds thereof when realized, in trust for us, receiving in respect thereof, on our account, the equivalent of £ as per invoices herewith inclosed to Messrs. Johnston, Pater & Co., and statement as below; which amount we direct you to keep apart from all other funds in your hands and to remit us the said sum for the credit of Messrs. Johnston, Pater & Co., in first-class bank bills

on England, not exceeding 90 days' sight made out in our favour. The remittance to be made within 30 days after arrival of the vessels at your port." The appellant realized the proceeds and remitted the amount in bills as directed for some years until the bankruptcy of Johnston, Pater & Co., when he claimed under the terms of the arrangement to retain enough of the proceeds of certain goods to cover the sums owing to him by Johnston, Pater & Co. The respondents having obtained the leave of Lawrance J. at chambers to issue a writ and serve notice of it in Brazil, issued a writ for nearly 18,000*l.* against the appellant for money had and received by the defendant for and to the use of the plaintiffs as their agent. Further affidavits having been made, the order of Lawrance J. was set aside by Day J. at chambers. The Court of Appeal (Lord Esher M.R., A. L. Smith, and Rigby L.JJ.) set aside the order of Day J. and restored the order of Lawrance J. The defendant brought the present appeal.

By Order XI., r. 1, of the Rules of the Supreme Court, "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever . . . .

"(*e*) The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

June 16. *Pickford Q.C.* and *Carver Q.C.* for the appellant. Adopting the construction put by the plaintiffs upon the terms of arrangement the defendant was bound to remit the proceeds of sale by purchasing first-class bank bills on England and posting them to England. As soon as that was done the defendant had performed his part of the contract. The part which the defendant had to perform was entirely outside the jurisdiction, namely, in Pernambuco where he lived. His breach of that contract (if he did break it) was also out of the jurisdiction. The case therefore does not fall within Order XI., r. 1 (*e*), which allows leave to be given for service out of the

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jurisdiction where there is a breach within the jurisdiction of any contract wherever made "which, according to the terms thereof, ought to be performed within the jurisdiction." "Ought" there means "must": there must be an obligation to perform it within the jurisdiction: *Bell & Co.* v. *Antwerp, London and Brazil Line* (1), where Lord Esher M.R. said: "Where a contract is one which may be performed in or out of the jurisdiction, as the case may be, I do not see how it can be a contract which, according to its terms, ought to be performed within any more than without the jurisdiction." That decision was followed by the Court of Appeal, including Lord Esher M.R., in *The Eider*. (2) In the present case the Court of Appeal appears to have decided on the ground that the defendant might have performed his part of the contract by paying cash in England—in other words, that the contract might be performed within the jurisdiction. Lord Esher apparently forgot his own previous decisions. In the Court of Appeal the respondents relied on *Rein* v. *Stein*. (3) That case turned on the fact that according to the course of business payment was to be made in England, and has no bearing on the present case.

Joseph Walton Q.C. and *J. A. Hamilton* for the respondents. In this case the defendant has received the plaintiffs' goods, sold them and altogether refused to remit the proceeds: his default is not merely in not sending bank bills within the thirty days, but in declining altogether to hand over the money. The thirty days have expired, the defendant has the plaintiffs' money, and this action is not for breach of a contract to remit, but for money had and received. His duty was to hold the plaintiffs' money on trust for them and to pay it to them. He has not done so: therefore an action lies for money had and received. Remittance by bills was optional: his duty was to cause payment to be made in England. If he had bought bills and posted them and they had been lost or stolen he would not have discharged his obligation: see *Robey* v. *Snaefell Mining Co.* (4) If the defendant's act in keeping the

(1) [1891] 1 Q. B. 103, 108.
(2) [1893] P. 119, 127, 132, 135.
(3) [1892] 1 Q. B. 753.
(4) (1887) 20 Q. B. D. 152.

money is not a breach of contract but a conversion of the goods, the plaintiffs may waive the tort and sue for money had and received.

Pickford Q.C. in reply.

EARL OF HALSBURY L.C. My Lords, I am unable to entertain any doubt in this matter, and I have the less hesitation in disagreeing with the judgment of the Court of Appeal because that judgment appears to me to be absolutely inconsistent with two previous judgments of the Court of Appeal which have apparently been accepted; and I confess that apart from those judgments I should entirely concur in the principle which they lay down.

Now let us see what the rule is with which we are dealing here. It is a somewhat artificial provision which is apparently intended to extend the power of suit by persons in this country against persons in foreign countries. For very obvious reasons, reasons which indeed have been made very apparent by the view which foreign countries have taken of an attempt to exercise the jurisdiction of Her Majesty's Courts in places beyond Her Majesty's dominions, it is provided that the action must be founded upon a "breach within the jurisdiction of any contract, wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction." That is the limitation of this effort to extend the process of these Courts to foreign countries. One can see exactly what was meant by that: that where the parties have agreed that something is to be done in this country, some part of the subject-matter of the contract is to be executed within this country, it is a sort of consent of the parties that wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country. But it by no means follows that every principle of law and every part of our legal procedure are to be applied to any contract although not within those limitations. It seems to me that that would be a very dangerous thing to attempt to enforce, and I believe it is entirely beyond the meaning of the rule.

Now in this particular case I can find no part of this contract

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which was by the terms of the contract to be performed in England. The thing which is alleged to have been not done, so far as I can gather from the circumstances and the covering letter, is a thing which according to the terms of the contract itself ought to have been done in Pernambuco. It is idle, as it appears to me, when there is the limitation which I have read as to the power of serving process in another country, to say, "Oh, but apart from this particular contract the relation between these parties was that of a buyer and a seller of goods." As a matter of fact that is an inaccurate statement. It was nothing of the sort. It was the employment of an agent for particular purposes and under particular circumstances of limitation. But even if there was any such contract, put in that simple form, between buyer and seller, I should not assent to the proposition that you can try to make out the particular circumstances which give the Courts power to serve writs out of the jurisdiction, and then, when you fail in that, say, "There was the general relation between us of buyer and seller, and therefore we can apply the general principle of English law, namely, that the debtor is to seek out his creditor and pay him where he lives, and as the creditor lives in England, that imports that some part of the contract is to be performed in England, and the breach of it is established by the non-payment in this country." It appears to me that that would be a very dangerous and entirely unreasonable construction of this rule which is intended to limit, for very manifest and important reasons, the power of serving English process in foreign countries.

The previous judgments of the Court of Appeal unfortunately do not appear to have been called to the attention of the Court of Appeal in this case. The language of the rule is plain enough; it is limited to a contract "wherever made which according to the terms" of the contract itself "ought to be performed within the jurisdiction." In order to justify the exercise of this limited and exceptional power of issuing process to be served in a foreign country, you must shew that the performance of the contract must (although the word "ought" is used in the rule, that is what I understand it to mean) under

the obligation of the contract itself be in this country. If that interpretation is applied—and the covering letter here really discloses the contract which at all events the plaintiffs insist upon—then it appears to me that the plaintiffs are obviously not within the rule, and this writ never ought to have been issued; and I move your Lordships that the judgment of the Court of Appeal be reversed, and the writ and the consequent proceedings thereon set aside.

LORD HERSCHELL. My Lords, I am of the same opinion. It appears to have been settled in more than one case, and I think quite rightly, that in order to justify the allowing service of a writ on a person outside the jurisdiction it is necessary to prove that according to the terms of the contract between the parties, some part of it at least ought to be performed within the jurisdiction in this sense, that the place for its performance, stipulated for either expressly or impliedly in the contract, is this country. I say I think those decisions of the Court of Appeal were perfectly right, because two things have to be shewn: that the action is founded on a breach within the jurisdiction, and that it is a breach of a contract "which, according to the terms thereof, ought to be performed within the jurisdiction." Now, it appears to me that there cannot be a breach, within the jurisdiction, of a contract unless some part of that contract was by its terms bound to be performed in the United Kingdom. I am not sure whether in the present case it was intended to depart from those decisions: it seems to me rather that they were overlooked, having regard to some of the observations that were made, especially by Smith L.J. However that may be, those decisions, I think, were perfectly correct, and the case must be decided upon that basis.

The case of the plaintiffs here was that the defendant obtained certain goods of theirs, or certain goods over which they had some rights, upon the terms of covering letters, a specimen of which is set out dated October 3, 1890. That is the case made by the affidavits; and it is the only case made throughout as far as I can see, although there is a contention, which I will come to in a moment, that on the defendant's own shewing he

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may be liable to the plaintiffs upon other grounds. This is the plaintiffs' case—that the defendant received the bills of lading upon the terms that the property represented thereby and the net proceeds when realized were to be held by him in trust for them, and that he was directed to keep the amount apart from all other funds in his hands. Then follow these words: "and to remit us the said sum to the credit of Messrs. Johnston, Pater and Company, in first-class bank bills on England, not exceeding ninety days' sight, made out in our favour. The remittance to be made within thirty days after the arrival of the said vessels at your port."

The first question which arises is what obligation was created by the receipt of the goods, assuming them to have been received on the terms of that letter? It was not a contract of sale; it was not a transaction between a vendor and a purchaser at all; it was a transaction by which the defendant, receiving certain goods, was to hold them for and on behalf of the plaintiffs on certain terms. What were those terms? That he should realize them or allow them to be realized by Johnston, Pater & Co., and when he received the proceeds should hold the money apart from his other moneys. But how was that money to be dealt with? It was to be remitted in first-class bank bills on England in favour of the plaintiffs. The whole of those provisions must be taken together as being the obligation created by the contract. There was no agreement to pay on demand; there was no agreement to pay in England in terms. The only agreement was that he was to hold this money for the plaintiffs and then turn it into first-class bank bills in favour of the plaintiffs and remit those. I cannot doubt that the word "remit" there means this and nothing beyond this—that the bank post bills, when obtained in favour of the plaintiffs, should be sent in the ordinary course and the ordinary manner in which such documents are sent by commercial men, namely, by mail, and that as soon as that had been done all obligation and all liability of the defendant ceased. I think it is impossible on these words to maintain that there was an obligation and a liability incumbent upon him until those bank post bills had reached the hands of the plaintiffs in

England. Therefore, what he had to do was all to be performed and could all be performed (it is enough to say that it could all be performed) in Pernambuco. There was no obligation resting on him after he had received that money of which he could not discharge himself in Pernambuco. Then, if that be the case, it is not a contract which by its terms "ought to be performed within the jurisdiction."

My Lords, I think that is the meaning of the word "remit." I think it is the natural meaning, and it seems to me that it is the only business meaning to put upon it, and I think the view that it is the right meaning is confirmed by the provision which immediately follows, that "the remittance is to be made within thirty days after the arrival of the vessels at your port." It is admitted that "the remittance" there must mean the sending the documents by post, and not their arrival in this country—so much I think is clear.

But then it is said that a different cause of action, a cause of action (not resting on the contract) for money had and received, would arise if within the thirty days provided for the remittance was not made. I cannot assent to such a proposition. I think the provision as to the time within which the remittance is to be made is an entirely independent stipulation. Of course, if there was a neglect to send it within the stipulated time for which the defendant was responsible, he would be liable for a breach of that stipulation supposing him to be bound by this contract; but that would not, in my opinion, at all alter the mode in which he was to deal with the money which he was to hold in trust; and, after the thirty days as well as before, I think he would have discharged all his liabilities as soon as he had converted any moneys he held into bank post bills and transmitted them in the usual course by mail to the plaintiffs.

Then, my Lords, one of the learned counsel for the respondents has taken a further point—that if the defendant did not act upon this covering note, which he entirely repudiates, and if he got hold of the goods and dealt with them, he was dealing with them wrongfully, that he could only claim to deal with them according to the terms of the covering note, and, as he now repudiates that, the plaintiffs are entitled to put

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aside the covering note and say, "We sue you for money had and received, which is in your hands as proceeds of goods belonging to us." My Lords, it seems to me first of all that that is not the case really put forward by them in their affidavits. Of course they sue for money had and received, but that may mean a multitude of things. It is necessary to look at the nature of the case they set up. They set up no such case, but they rely upon the fact that the defendant, as they say, repudiates his being bound by the covering note, and therefore they are entitled to treat the case as outside the covering note altogether. But, my Lords, however they treat it, they must establish a contract by the terms of which something was to be done in this country. Unless they can shew such a contract they have no case within this rule. Supposing goods are dealt with by a person who repudiates the contract and deals with them as he has no right to do under the contract, it is a tort. That tort was committed in Pernambuco. It may be that upon the commission of such tort the tort may be waived by the person interested whose goods have been converted and he may sue for money had and received; but in that case I think it is impossible to contend that there would be any contract to be performed in this country within the meaning of the rule, because the argument would have to be this: a man in a foreign country has committed a wrong, and because the person against whom the wrong has been committed is entitled here according to our law to waive the tort and sue for money had and received, and inasmuch as money had and received becomes a debt, and inasmuch as the debtor is bound to find his creditor out, and inasmuch as the creditor in that case would be in this country, you have a breach of a contract to be performed in this country.

My Lords, I should be very sorry indeed to put any such construction upon the rule. I am quite sure no such construction could possibly have been intended, because the result would be, by a fiction of that description, to enable process to be served upon a person abroad when the real cause of action was, as it is suggested in such a case, a tort committed by him in a foreign country, and not a breach of any contractual

obligation to be performed in this country. For these reasons I think the point which has been taken, which is an ingenious one, but not the one dealt with at all by the judgment of the Court of Appeal, cannot be sustained, and the judgment of the Court of Appeal must be reversed.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD MORRIS. My Lords, the action is brought for money had and received under the first clause of the covering letter, whereby the defendant undertook to be the agent of the plaintiffs and to hold the proceeds of the goods for them in trust, and, as I apprehend, consequently, arising from that, to pay over the proceeds to the plaintiffs whenever so requested to do. If the covering letter ended there, I should be rather inclined to come to the conclusion that there was a cause of action for breach of a contract which was in this country, namely, that the money had not been paid over to the bank at Liverpool in this country. Then, does the following clause of the covering letter alter that position? I have some doubt whether it does or not. I do not intend to dissent formally from the judgment which has been proposed, especially as my dissent would be of no practical value; but I entertain great doubt whether this second clause in the letter, directing that the money should be sent to Liverpool in a particular way, alters the liability, if it existed, under the earlier part of the covering letter.

LORD SHAND. My Lords, the rule which has formed the subject of so much discussion to-day was carefully considered after full arguments in the two cases of *Bell* v. *Antwerp, London and Brazil Line* (1) and *The Eider* (2), and I am clearly of opinion that the view taken by the learned judges in those cases as to the sound construction and effect of the rule is right. The result of those cases, I take it, is practically this —that when it is shewn that a plaintiff is entitled to require the performance of a contract in this country, and that consequently a breach takes place in this country, process may be served out of the country; but I hold upon the authority of those cases,

(1) [1891] 1 Q. B. 103. (2) [1893] P. 119.

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and believing them to be in accordance with the true construction of the language used, that the rule is limited to this, and that there is no right to serve out of the jurisdiction where the performance of the contract may be given either within the jurisdiction or abroad in the option of the party who has undertaken the obligation.

I agree with my noble and learned friend on the woolsack as to the inexpediency of seeking to extend the rules which admit of service out of this country on persons domiciled in a foreign country and against whom the courts of this country have no jurisdiction. Indeed, I doubt much whether in the absence of any special treaty the courts of a foreign State would feel bound to give effect to a decree obtained under the rule even in its present form—which seems to violate the general principle "actor sequitur forum rei."

In the application of the rule to this case there seems to be no difficulty. The writ, I see, was served two or three days after the affidavit had been framed for the purpose of supporting it, and the affidavit, as printed in these papers, at all events, expressly bears upon it that it was used in support of or for obtaining the writ. The affidavit seems to me to disclose plainly that this covering document was sent out with the bills of lading, and the covering document appears to me expressly to provide, as regards the place of the performance of the contract, that putting bank bills of the special character named in the post in the foreign country was to be the performance of the contract. That being so, it seems to me to be clear that the rule has no application to this case.

Order appealed from reversed and order of Day J. restored with costs here and below; cause remitted to the Queen's Bench Division.

Lords' Journals, June 16, 1898.

Solicitors for appellant: *Field, Roscoe & Co., for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for respondents: *Wynne, Holme & Wynne, for Evans, Lockett & Co., Liverpool.*

[HOUSE OF LORDS.]

THE RT. HON. FREDERIC BARON WOLVERTON . . . . . } APPELLANT; H. L. (E.) 1898 July 12.

AND

THE ATTORNEY-GENERAL . . . . RESPONDENT.

Revenue—Succession Duty—New Succession—"Alienation"—Succession Duty Act, 1853 (*c.* 51) *ss.* 2, 15, 17, 18.

A peer bequeathed his residuary personal estate in trust for his wife for life and after her death in trust for the person who should then be his right heir absolutely. After his death five nieces became his co-heiresses, and the appellant, a nephew, succeeded to the title. In order to make provision for the title a deed of family arrangement was executed whereby the testator's widow assigned her interest in bank shares (part of the testator's residuary estate), and the co-heiresses and the appellant respectively assigned their contingent reversionary interests in the residue, to trustees in trust by clause 1 during the widow's life to pay out of the income of the bank shares an annuity of 15,000*l.* to the appellant and other annuities to the co-heiresses; and by clause 2 after the widow's death to pay out of the income of the whole residue an annuity of 15,000*l.* to the person for the time being holding the title, with other payments to the co-heiresses and provisions for keeping up the title. The widow died and the co-heiresses paid legacy duty at 3 per cent. on the whole residue. The Crown having claimed succession duty at 6½ per cent. from the appellant in respect of his annuity under clause 2 of the deed:—

Held, that the Court of Appeal was right in holding that the annuity was not payable under "a contract made for valuable consideration in money or money's worth" within s. 17 of the Succession Duty Act 1853; and wrong in holding that the deed created a new succession; that the case fell under s. 15 and was one of "alienation" of part of the succession created by the testator's will, whereby the duty payable in respect of the annuity was at the same rate and time as would have been payable if the annuity had not been created; but that as legacy duty had been paid upon the whole residue out of which the annuity was carved, s. 18 applied and no succession duty would have been payable by the co-heiresses if the annuity had not been created, and therefore that the effect of ss. 15 and 18 together was that no succession duty was payable by the appellant in respect of the annuity.

The decision of the Court of Appeal, [1897] 1 Q. B. 231, reversed.

In re Cooper and Allen's Contract, (1876) 4 Ch. D. 802, commented on.

THE 2nd Baron Wolverton died in 1887 having by his will (made in 1885) after sundry bequests and devises devised

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and bequeathed (in the events which happened) the residue of his real and personal estate including his bank shares in trust for his wife for life, and after her death in trust to make over the whole residue to his nephew Henry Richard Glyn if he should be then living, and if he should be dead then in trust for the person who should then be the testator's right heir at common law absolutely. On the testator's death Henry Richard Glyn became the 3rd Baron Wolverton and died without issue on July 2, 1888. At his death the appellant became the 4th Baron Wolverton, and the testator's five nieces became his co-heiresses. The parties being advised that unless the co-heiresses died in the lifetime of the testator's widow no part of the testator's residuary estate would come to the person holding the title (contrary to the testator's supposed intention), a deed was made on July 31, 1888, between the testator's widow, the co-heiresses, the appellant and other persons, whereby (inter alia) the testator's widow assigned her life interest in the bank shares, and the co-heiresses and the appellant respectively assigned their contingent reversionary interests in the testator's residuary estate, (collectively called the settled property), to trustees in trust (inter alia) by clause 1 during the life of the testator's widow to pay out of the annual income of the settled property an annuity of 15,000*l.* to the appellant during his life, and other annuities to the co-heiresses during their lives, the surplus income to be accumulated; by clause 2, after the death of the testator's widow and until the trust for accumulation thereinafter directed should cease, out of the income of the settled property to "continue to pay the said annuity of 15,000*l.*" in like manner as thereinbefore provided with regard to the appellant to the person for the time being holding the title of Baron Wolverton during his life; to accumulate part of the surplus income until certain events should happen and to make certain payments to the co-heiresses and the person for the time being holding the title, with other trusts not material to this report.

The testator's widow died in June, 1894. Upon her death legacy duty at the rate of 3 per cent. was paid upon the whole residue of the testator's estate, which consisted of personalty.

An information was filed against the appellant claiming that upon the death of the testator's widow succession duty at 6½ per cent. under the Acts 16 & 17 Vict. c. 51 and 51 Vict. c. 8 s. 21, and estate duty under 52 Vict. c. 7 s. 6, became payable by the appellant in respect of the value of the annuity of 15,000*l.* to which he as the person for the time being holding the title of Baron Wolverton became entitled in possession under clause 2 of the deed of July 31, 1888.

The Queen's Bench Division (Pollock B. and Bruce J.) made a decree as claimed by the Crown, (1) and this decision was affirmed by the Court of Appeal (Lord Esher M.R., Lopes and Rigby L.JJ.). (2) Against these decisions the appellant brought the present appeal. (3)

1897. Nov. 18, 22, 23, 25. *Cozens-Hardy Q.C.* and *Swinfen Eady Q.C.* (*Danckwerts* with them) for the appellant. The

(1) [1896] 2 Q. B. 389.

(2) [1897] 1 Q. B. 231.

(3) By the Succession Duty Act 1853 s. 2 "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "Succession"; and the term "Successor" shall denote the person so entitled; and the term "Predecessor" shall denote Settlor, Disponer, Testator, Obligor, Ancestor, or other person from whom the interest of the successor is or shall be derived."

By s. 15. . . . "Where, after the time appointed for the commencement of this Act, any succession shall, before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created. . . ."

By s. 18 . . . . "No person charged with the duties on legacies and shares of personal estate under the legacy duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property."

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claim of the Crown in respect of the 15,000*l.* annuity payable after the death of Lady Wolverton to the appellant, as the person for the time being holding the title, is based upon the fallacy that the deed of July 1888 created a new succession. The testator's will created a succession whereby upon Lady Wolverton's death the testator's whole residue passed to his right heir, namely, the co-heiresses. What the deed of July 1888 did was out of that succession of the co-heiresses to take a portion, namely, 15,000*l.* a year, and transfer it to the appellant. That was not a new succession, it was simply an alienation of part of the co-heiresses' succession. To make a new succession there must be a new death. Some confusion has been introduced by discussing the difference between the annuity of 15,000*l.* payable during Lady Wolverton's life and that payable after her death. The first annuity has no bearing upon the question, it ceased at Lady Wolverton's death, and no question of succession arises in connection with it. A gift inter vivos creates no succession. The alienation of part of the co-heiresses' succession by the grant of the annuity under clause 2 falls precisely under s. 15 of the Succession Duty Act, and the duty payable in respect of it is at the same rate as would have been payable by the co-heiresses if they had not alienated, namely, 3 per cent. But they have paid legacy duty at 3 per cent. upon the whole residue of the testator's estate out of which the 15,000*l.* annuity was carved, and by s. 18 they are therefore exonerated from succession duty: see Hanson's Death Duties, p. 641. Therefore by ss. 15 and 18 read together no succession duty is payable by the appellant in respect of the annuity. The Crown (not for the first time) is claiming the same duty twice over, with an increase in the rate; it is attempting to make two successions on one death in respect of one devolution of property. The views of Lord Campbell L.C. and Lord Wensleydale in *Braybrooke* v. *Attorney-General* (1) are in the appellant's favour. So in *Solicitor-General* v. *Law Reversionary Interest Society* (2) Cleasby B. says that when there is a succession, it "will be when the proper time comes a succession enjoyed in possession, into

(1) (1861) 9 H. L. C. 150, 171, 177. (2) (1873) L. R. 8 Ex. 233, 238.

whatever hands it has come." In *Attorney-General* v. *Cecil* (1) Cleasby B.'s judgment is in favour of the appellant as it intimates that where an interest is carved out of a succession, which as a whole pays duty, no succession duty is payable in respect of such interest. The conjoined construction of s. 2 defining "predecessor" and "successor," and of s. 15 adopted by Jessel M.R. in *In re Cooper and Allen's Contract* (2) shews that the appellant's interest under the deed is not a "new succession" from the co-heiresses.

Sir R. E. Webster A.-G. and *Sir R. B. Finlay S.-G.* (*Vaughan Hawkins* with them) for the respondent. Legacy duty was paid under the 2nd Lord Wolverton's will, but no succession duty: and the appellant must pay succession duty in respect of the annuity even though it comes out of a fund on which legacy duty has been paid. The payment of legacy duty does not make the appellant the less a "successor" to the co-heiresses. For legacy duty payable on property enjoyed by different persons in succession at different rates, see Legacy Duty Act 1796 (36 Geo. 3 c. 52) s. 12. The payment of this duty by the co-heiresses has nothing to do with the appellant's succession, and does not exonerate him. Their acquisition is under Lord Wolverton's will, not under the deed of 1888, and therefore s. 18 of the Succession Duty Act has no application. For the purposes of the deed the co-heiresses are settlors, not successors. Three conditions must be fulfilled to entitle to the exemption of s. 18: (1.) The person to be exempted from succession duty must be the same as has paid legacy duty; (2.) it must be in respect of the same property, and (3.) the same acquisition. This was a different acquisition of a different property. The exemption does not extend for the benefit of a new succession created by the original successor acting as a settlor. *Attorney-General* v. *Cecil* (1) shews that this was a disposition by the co-heiresses as settlors, and that s. 15 does not apply. That case was approved by Lord Cairns in *Charlton* v. *Attorney-General*. (3) In *Attorney-General* v. *Mitchell* (4)

(1) (1870) L. R. 5 Ex. 263; 39 L. J. (Ex.) 201.
(2) 4 Ch. D. 802, 824.
(3) (1879) 4 App. Cas. 427, 440.
(4) (1881) 6 Q. B. D. 548.

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it was held that appointees under a will were not exempt from succession duty, though the donee of the power had paid legacy duty on the whole fund, and the appointees equally with the donee derived their interest from the testator, donor of the power.

The deed is a "disposition" within the meaning of s. 2 of the Act of 1853. The residuary legatees during the life of the tenant for life create an annuity to take effect when the life drops. Where persons so acquire an interest on the death of a third person, there is a "disposition" under s. 2. If an alienation creates, as the deed did, a new succession, the assignee must pay the duty. So far as the appellant is concerned the will may be disregarded, as he takes under the deed, and thus a new succession is created. Martin and Cleasby BB.'s judgments in *Cecil's Case* (1) exactly apply. The wide interpretation placed on s. 2 and the word "successor" is shewn in *Attorney-General* v. *Littledale* (2); in *Charlton's Case* (3); in *In re Jenkinson* (4); *Attorney-General* v. *Yelverton*. (5) The two latter cases are referred to in *Attorney-General* v. *Floyer* (6), which Lord Cranworth C. said was not distinguishable from *Braybrooke* v. *Attorney-General*. (7) In *Cooper and Allen's Contract* (8) it was held that where one succession is substituted for another, the duty is determined by the later succession; and that s. 15 is confined to alienations which do not confer successions; and succession is sometimes used in the sense not of property but of the interest of a person.

By the deed of 1888 an entirely new fund was brought into settlement. It was a new and different settlement from that created by the will. The trustees were different and the purposes different. The annuity during Lady Wolverton's life came out of the bank shares and her life interest therein, and was given to the appellant by name. The annuity after her death came out of the whole residue and was given to the

(1) L. R. 5 Ex. 263; 39 L. J. (Ex.) 201.
(2) (1871) L. R. 5 H. L. 290.
(3) 4 App. Cas. 427, 440.
(4) (1857) 24 Beav. 64, 73.
(5) (1861) 7 H. & N. 306.
(6) (1862) 9 H. L. C. 477, 486, 491.
(7) 9 H. L. C. 150.
(8) 4 Ch. D. 802, 824.

person holding the title, whoever he might be. An interest created as this is under such a deed is a succession. Jointure rent-charges were so held in *Floyer* v. *Bankes*. (1) In *Fryer* v. *Morland* (2) Jessel M.R. held that a bonâ fide sale created no succession, and the inference to be drawn from the judge's language is that every case except a sale or mortgage of a reversionary interest is within s. 2 so as to constitute the relation of successor and predecessor. This is clearly a disposition of property by which the appellant became entitled "after the commencement of the Act"; and is not governed by s. 15 the object of which is only to regulate the rate of duty when there is not a new succession.

As to the date at which the Act came into operation see *Wilcox* v. *Smith*. (3) To constitute a new succession it is not necessary that a new life should be introduced. The question is under whom does the successor take, and the answer is the co-heiresses, or the testator's widow, or both.

[They also referred to *Attorney-General* v. *Abdy* (4) and to *Attorney-General* v. *Gardner*. (5)]

Cozens-Hardy Q.C. in reply.

The House took time for consideration.

July 12. EARL OF HALSBURY L.C. My Lords, George Grenfell, 2nd Baron Wolverton, died on November 6, 1887. Under the provisions of his will, and in the events which happened, five nieces became entitled to his residuary estate upon the death of Lady Wolverton. That lady died on January 4, 1894, and upon her death legacy duty at the rate of 3 per cent. per annum was paid upon the whole residue of the testator's estate.

On December 31, 1888, a deed was executed by among others the five nieces, the late Lady Wolverton, and the present Lord Wolverton. By that deed the present Lord Wolverton, the appellant here, became entitled to an annuity of 15,000*l*., and

(1) (1863) 3 D. J. & S. 306.
(2) (1876) 3 Ch. D. 675.
(3) (1857) 4 Drew. 40.
(4) (1862) 1 H. & C. 266.
(5) (1863) 1 H. & C. 639.

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the question is whether he is liable to pay succession duty upon this annuity.

The claim of the Crown is based upon the annuity being liable as upon a succession coming to the appellant from the late Lady Wolverton, or the five nieces, or from both, and the sum of money in question is said to come within the express language of s. 2 of the Succession Duty Act, 1853. [His Lordship read the section.]

Before dealing with the particular question now before your Lordships, it will not be inappropriate to say a word or two upon the apparent scope and object of the section I have quoted. What it points to is the disposition of property by reason whereof a person becomes beneficially entitled upon the death of any person. The disposition may be past or future: it may take effect immediately or after an interval; it may be either certainly or contingently; it may be either originally or by way of substitutive limitation; but with all these safeguards against evasion it must be a disposition by reason whereof a person has become beneficially entitled upon the death of some person. If a person were to confer by a deed of gift inter vivos his own existing property it would seem impossible to contend that this is a new succession. It is simply a transfer inter vivos of one person's property to another, and is not within the scope of the Act at all. Whether the succession be operated by disposition or devolution, it must be a succession upon death.

Now, my Lords, I am unable to understand how the annuity created under the deed to which I have referred is a succession at all. If it is a gift inter vivos deriving no force from the death of any one, I do not find any words in the section which make it chargeable with duty. If it were chargeable, a voluntary gift by any one, or any part of it during his own life, would equally make such gift chargeable with duty, and the whole nature of the legislation aimed at—succession upon death—would be altered into taxation upon transfer of any property by gifts inter vivos, and this to any extent of remoteness, so that each donee though inter vivos would become in turn the predecessor within the meaning of the section to each

subsequent donee of the same property, although no new death had intervened at all, but simply a change of proprietorship.

It is obvious to ask in this case whence it is that Lord Wolverton's interest in the annuity is derived. The Crown contends that it is derived from the nieces, or from Lady Wolverton, or from both. Let us take them separately. Suppose these ladies had waited to make the deed in question till the death of Lady Wolverton, and had thus become entitled in possession to the whole of the late Lord Wolverton's residuary estate, would they then have been entitled to hand over all or part of what had become absolutely their own? The element of succession upon death would be entirely wanting, and though the word "succession" has a technical definition in the Act, the whole scope and meaning of the Act points to a distinction between alienation between living persons and a succession which death has opened to a successor.

It seems to me that if this case can be maintained then, if A. inherits and pays his succession duty, every donee from A. down to Z. must pay it also. Such a tax would be both unreasonable in itself and impossible of collection. The succession to property upon a death is one thing; the free gift inter vivos is a totally different thing.

I am aware that the Crown repudiated this view; but it is not permissible to repudiate the logical conclusion of a contention by saying that the Crown would not insist upon such a right. It will not do to throw over consequences which may reduce the argument to an absurdity. The question here is the true construction of the Act. I am unable to deal with it, because I am afraid I do not understand the suggestion of one succession being substituted for another, or how in this case it would arise.

The present Lord Wolverton got nothing upon the death either of the second Lord Wolverton or by the death of Lady Wolverton. The utmost that can be said is that upon the occurrence of the death of Lady Wolverton the present Lord Wolverton's donors obtained the power to render effectual a gift which they had inter vivos agreed to give him before the death took place. "Succession" in the Act means not the

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act of succeeding but property chargeable with duty under the Act, and, as Bramwell B. pointed out in *Re Peyton* (1), property may escape the tax for all time by always passing inter vivos.

I am of opinion that the annuity given by the deed of December 31, 1888, is not within s. 2 of the Act at all. Lord Wolverton certainly obtained nothing by Lady Wolverton's death. She dealt with her own life interest in the property during her life.

I am not, of course, suggesting that the transfer inter vivos of property the right to which arises upon the death can escape the duty by its being transferred to a person other than the original successor. The succession once created the duty must be paid for it; but I can find no warrant in the statute for a new succession duty being leviable upon the same property or money where no new death has created the right to such succession.

My Lords, I have hitherto dealt, and only dealt, with the 2nd section itself. It is that section which imposes the tax. But the 15th section, which is supplementary to it, to my mind places the matter beyond all possibility of doubt. The framers of the Act contemplated the case of the original person intended to succeed under the disposition or devolution spoken of in s. 2 transferring the interest to some other person, and I think the whole effect of that part of s. 15 with which we are dealing is that the person to whom such an interest has been transferred shall stand in the shoes of the person originally entitled, and shall be chargeable with duty at the same time and at the same rate as the person originally entitled would have been chargeable if the interest had not been so transferred.

The succession to the sum of money which created the annuity of 15,000*l.* was a succession rendering the successor liable to the tax, but the "successor" were the five nieces, and undoubtedly they would be liable to the tax if they had not already paid it in a different form. But they had paid it in the form of legacy duty; and the Succession Duty Act enacts that any one who is charged with the duties on legacies shall not

(1) (1861) 7 H. & N. 296.

also be charged in respect of the same acquisition of property under the Succession Duty Act.

I do not think it would be proper to rely upon the fact that the legacy duty was charged, if it were charged, erroneously—that could not estop the Crown in arguing what was the true construction of the Act. But I think it was charged, properly, rightly.

Looking at the scheme of the Act and the application of the 2nd, 15th, and 18th sections as applied to the facts in the present case, I confess I am unable to appreciate the difficulties which have been supposed to surround it.

It is not very intelligible to me what is intended by the argument relied on, apparently, so much in the Court below, as to whether the annuity granted to Lord Wolverton was one annuity or two annuities. If (what is the only intelligible meaning that I can attribute to these phrases) it is meant that the sources from which the annuity given to Lord Wolverton are two different sources, that is quite true; but what relevancy has it to the question under debate? Lady Wolverton could and did only affect her own life estate. On her death nothing was left to succeed to. The co-heiresses by the annuity to Lord Wolverton gave nothing to which a title accrued by any one's death; and I am unable to see, therefore, what the other source from which the annuity is derived has to do with this question. Nor do I see what relation the mode in which people dispose inter vivos of what they have got already can affect the question of what is only payable upon a succession, which by the hypothesis is not a new succession, but a disposition of property obtained under an old succession upon which duty has been paid already.

It seems to be assumed without explanation, at least so far as I can understand, that there is a new succession; and if there were a new succession, no doubt the consequence would follow. But the only point being whether there is a new succession or not, that appears in the argument to be assumed; and then an elaborate explanation is given of the consequences that must follow from that succession. For the reasons, however, I have given, I think there is no new succession; and, if there is not,

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it is to my mind perfectly immaterial what in fact is done with the property to which a donee had already succeeded.

My Lords, as to the point upon the 17th section, I quite concur with the Court of Appeal that the argument founded upon that section is untenable.

For these reasons, I am of opinion that the judgment of the Court of Appeal ought to be reversed with the usual result as to costs; and I move your Lordships accordingly.

LORD HERSCHELL. My Lords, the Attorney-General, by the information upon which this appeal arises, sought to have it declared that upon the death of the late Lady Wolverton succession duty at the rate of 6½ per cent. became payable in respect of the value of an annuity of 15,000*l.* per annum to which the defendant became entitled under a deed to which I will call attention immediately. The Divisional Court by its order made the declaration prayed; and this order was affirmed by the Court of Appeal.

The second Lord Wolverton by his will vested his property in trustees upon trust to pay, assign, and make over the whole residue of his estate to Henry Richard Glyn if he should be living at the time of the decease of the testator's wife, and, if he should be then dead, to stand possessed thereof upon trust for the person who should be the testator's right heir at common law for his absolute use and benefit.

Henry Richard Glyn died in the lifetime of Lady Wolverton, and at her death the five daughters of a brother of the testator, being his right heirs, became entitled to his residuary estate. These ladies were called in the argument his co-heiresses, and it will be convenient to adopt this designation.

After the death of the testator and H. R. Glyn a deed of arrangement was entered into, to which Lady Wolverton, the co-heiresses, and the present Lord Wolverton were parties. The arrangement was founded, as the deed expressed, on the circumstance that it was contrary to the supposed intention of the testator that no part of his residuary estate should devolve on the person for the time being holding the title of Baron Wolverton. It is not necessary to refer to the provisions of

the deed so far as they relate to what was to be done during the lifetime of Lady Wolverton, inasmuch as in my opinion they have no bearing whatever upon the point which has to be determined. Their introduction into the argument in the Courts below tended, I think, to obscure the real point, and thus perhaps assisted to bring about what I think was an erroneous conclusion. The whole residuary estate of the testator expectant on the death of Lady Wolverton became by the arrangement vested in trustees who were, as soon as Lady Wolverton died, to pay out of the annual income thereof an annuity of 15,000*l.* a year, "in like manner as thereinbefore provided with regard to" the appellant, "to the person for the time being holding the title of Baron Wolverton." This is the annuity in question. I pause here to call attention to the legal position of the parties. But for the deed of arrangement the co-heiresses would on the death of Lady Wolverton have become entitled in possession to the whole of the residuary property left by the testator. The only title which the appellant had to any part of it was derived from the assignment contained in the deed under which they had vested the property in trustees in part for his benefit. It is only by virtue of this assignment that he is entitled to the annuity. Legacy duty at the rate of 3 per cent. (the rate applicable to the case of nieces taking a benefit from an uncle) has been paid to the Crown in respect of the whole of the residuary estate.

There can be no doubt, as was admitted by the Crown, that the disposition by the testator by reason whereof the co-heiresses became entitled to his residuary estate upon the death of Lady Wolverton conferred a succession, and that they became "successors" and the testator their "predecessor" within the meaning of the 2nd section of the Succession Duty Act. I take it to be equally clear that the succession came into existence as soon as the testator died, and that its creation was not postponed until the death of the tenant for life. Indeed, this was admitted by the Solicitor-General as soon as his attention was called to the terms of the section making it applicable to past dispositions.

It was contended for the Crown that the disposition contained

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in the deed of arrangement also created a succession to a part of the same property, namely, the annuity on the death of Lady Wolverton, that the successor under this disposition was the appellant, the predecessor being his cousins, the co-heiresses. The disposition contained in the deed of arrangement came, it was said, within the very terms of s. 2, and not the less so even if it were the mere transfer from one person to another of a part of the succession already created.

It was not, however, argued that in such a case there were two successors who came into possession at the death of the tenant for life, but that the disposition by way of assignment by the original successor created a new succession which was substituted for that conferred by the prior disposition. I do not wonder that the contention was thus limited, for it would otherwise inevitably have followed that if property to which a person was entitled expectant on a death had passed by deed inter vivos a dozen times by way of gratuitous assignment during the lifetime of the tenant for life, a dozen duties would have been payable although the last assignee only would have acquired the property in possession.

My Lords, I will assume for the purpose of argument that the disposition contained in the deed of arrangement was such as to satisfy the terms of s. 2. In my opinion it was because the Legislature thought that an alienation by a successor of his succession might be thought to be within those terms that the 15th section was framed as it is. But before referring to the provisions of that section I will deal with the argument presented on behalf of the Crown.

My Lords, I am unable to find in the Act any warrant for the view that a succession once created can, by the act of the successor, cease to exist and another succession be substituted for it. The words of s. 10 are precise: "There shall be levied and paid to Her Majesty in respect of *every* such succession as aforesaid" the following duties; and these are made dependent on the relationship of the predecessor and successor. This provision operates, in my opinion, as soon as the disposition is made by which a "succession" is conferred. Moreover, "succession" denotes, by clause 1, any property chargeable

with duty under the Act. No doubt the time of payment is fixed by s. 20; but this is quite a different thing from the obligation to pay. The time of payment is to be when the successor "or any person in his right or on his behalf" shall become entitled in possession to his succession. This contemplates that at the time the succession falls in some person in right of the successor, and not the successor himself, may be entitled to the possession. The original successor is none the less called the successor.

I have not forgotten the argument of the Solicitor-General that an alienee for value does not become a new successor although a gratuitous alienee does, and that the language I have alluded to is thus sufficiently satisfied. I shall deal with this argument when I come to consider the 15th section of the Act. It does not touch the point I am now concerned with, that s. 20, to say the least, affords no support to the argument that one on whom a succession has been conferred can destroy it and the obligation to pay the duty which was attached to it by alienating it.

And when we come to s. 44, which provides who are to be "personally accountable" to Her Majesty "besides the successor," amongst those named are "every person in whom" any property subject to such duty "shall be vested by alienation or other derivative title at the time of the succession becoming an interest in possession." Here again there is nothing to suggest that a person who has once been a successor has ceased to be so if, prior to the time of the succession becoming an interest in possession, he has alienated it.

It was argued that the provisions of s. 21, relating to the mode of assessment of the duty, in the case of real estate, would hardly be workable if in those provisions the word "successor" were held to refer to the original successor and not to his alienee. I think the application of this section may give rise to difficulty in certain cases. But it is to be observed that it does not determine either who is to be charged with the duty when it attaches or becomes payable, or what is to be its rate. It is merely a rule for ascertaining the amount. And the difficulty is not got rid of by adopting the argument of the

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Crown, for it is just as great in the case of an alienation for a money consideration, which it is admitted does not make the alienee a new successor, as in the case of a gratuitous alienation. It is not necessary to express any opinion on the operation of that section (which was discussed in *Solicitor-General* v. *Law Reversionary Society* (1)) ; it is enough to say that it affords no sufficient reason for departing from what appears to me to be the unambiguous meaning of the leading provisions of the Act to which I have called attention, and which it must be remembered apply to realty and personalty alike.

I am not surprised that the notion that the gratuitous alienation of a succession before the time for payment of the duty arrives creates a new succession, ousting the original one and becoming substituted for it, finds no countenance in the provisions of the Act. In the present case the contention of the Crown operates in favour of the revenue and increases the amount of the tax, but in many, and perhaps the majority of cases, it would have precisely the contrary effect. It would be strange if a person in whom a succession had been created by a stranger in blood, and in respect of which therefore a duty of 10 per cent. would be payable, should be able by a gratuitous alienation to his son before the death occurred to reduce the duty payable to 1 per cent. It seems to me inconsistent with the entire scheme of the Act that when once a succession has been created and the liability to duty has attached, a mere voluntary assignment of the right vested in the successor by the disposition, or any part of it, should alter the succession duty and make another, and it may be a lower, duty payable at the time when the succession falls into possession.

Before proceeding to consider the 15th section, I may refer to the only authorities I am aware of bearing upon the question whether the alienation of a succession, or the creation of a new succession by alienation, can so extinguish the original succession as to get rid of the duty which has become leviable and chargeable in respect of it.

In *Solicitor-General* v. *Law Reversionary Society* (1) the Court of Exchequer laid down certain conclusions as established

(1) L. R. 8 Ex. 233.

on a consideration of the various sections of the Act. They held that, though the duty is not payable until the time of actual enjoyment of the property, "the title to the succession dates from the disposition, and there is never any title to the property free from the duty," and that a person who has had a succession conferred upon him cannot by parting with it prevent it from being a succession.

The only case which affords any support to the idea that a new succession can take the place of an old one is *Cooper* v. *Allen* (1), decided by the late Sir George Jessel. In that case, A. and B., tenant for life and remainderman, conveyed their estates for money to C. in fee. C. died, having devised to D. in fee. D. paid duty on his succession from C. It was held that no more duty would be payable on the death of A., the tenant for life. It must be borne in mind that the case related to real estate, and that it was a special one, inasmuch as C., having taken a conveyance from the tenant for life, came at once into possession of the land, and the income and profits thereof, in respect of which a succession had been created. Sir George Jessel was of opinion that the conveyance to C. did not create a new succession, and that if he had remained owner until the death of the tenant for life the duty payable on the death of the tenant for life by the remainderman would have been payable by C., but that inasmuch as a new succession was created by the devise to D. and the death of C., the only duty payable was on that new succession. That new succession arose from a new disposition making the succession to property dependent on a new death, and it related to real estate; the case is therefore quite distinguishable from the present.

But there are observations of Sir George Jessel which have a bearing on the present case. I confess I find a difficulty in following some of the reasoning of the learned judge. He considered that because D. succeeded on the death of C., and that was a new succession, duty could only be payable on that succession, and the duty which attached by reason of the original disposition was no longer payable. Why, he asks, should a successor who is in possession of property pay two

(1) 4 Ch. D. 802.

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duties? The Crown has, he says, by the merger got the benefit of reducing the estate once more to the fee simple on which there is a succession, and a successor coming in pays the duty. Further on there occurs the following passage: "I think it is very difficult to give any meaning to the exception from the 15th section of alienations conferring new successions, unless it has the meaning which I attribute to it, because if the alienation does not confer a new succession, duty is to be paid at the same rate and time as on the original succession, that is you are to wait for the payment. If it confers a new succession, then of course you will get payment on whichever succession comes first." Again, in discussing the effect of the 14th section, which applies only to personalty, the learned judge says that it would be singular if in the case of realty more than one duty was payable in case of devolution on death during the lifetime of the tenant for life "because the Act was intended to assimilate the duty upon personalty and realty." And he adds further on: "In the case of succession to real estate, the object of the Act is to let the last succession prevail; but as regards personal estate it is enacted that the highest duty shall be paid."

I cannot see how the reasoning of the learned judge establishes that in the case before him there could be only one succession duty payable, and that in respect of the new succession. The merger of which the learned judge speaks did not arise by virtue of C.'s disposition, for the fee simple was vested in C. during his lifetime, just as much as in D. after his death. It arose from the fact of his taking a conveyance from the tenant for life as well as from the person entitled to the succession. He was thereupon entitled to the estate in immediate possession. But the possession to which he then became entitled, and his right to the income and profits of the land, was not derived from the conveyance to him of B.'s succession, but solely from the fact that he was the owner of A.'s life estate. If he had purchased this only, he would have been equally entitled to possession of the land and to the income and profits thereof. If he had only purchased the succession, he would at that time and down to his death have been entitled to

neither. The devise by C. to D. created a succession in respect of property which was not at that time the subject of any succession, namely, the estate during the life of A. I think, with all respect, that Sir G. Jessel overlooked these facts. When D. came into possession of the land by reason of C.'s devise, he undoubtedly became entitled in possession to a succession, and duty became then payable in respect of it, though the original succession had not then become, in the language of s. 44, "an interest in possession." Duty would equally have been payable if C. had never acquired any title to the remainder in respect of which a succession had previously been conferred, and no title thereto had passed to D.

It is not necessary to determine what duty or duties became payable by D. Nor is it necessary to decide whether in the case of real estate the object of the Act is to let the last succession prevail. Such a conclusion cannot, however, in my opinion, be deduced from s. 15, which only prescribes what duty is to be paid where a new succession has not been conferred. The argument derived by the learned judge from a consideration of the provisions of s. 14 in connection with s. 15 is in my opinion not a sound one. It is not correct to say that the Succession Duty Act was intended to assimilate the duty upon personalty and realty. Even in the view adopted by the learned judge the assimilation was not complete, for whilst in the case of personal estate, if there were several successors by death to the interest of the original successor before it fell into possession, the highest rate of duty is imposed which if every successor had been subject to duty would have been payable by any one of them, in the case of realty the rate was said to be determined by the last succession, and might therefore be the lowest instead of the highest.

But in truth, so far from assimilating realty and personalty for purposes of the duty, the Act created a fundamental distinction between them, and that to the advantage of realty. For whereas in the case of personalty the duty was charged at the prescribed rate upon the capital value of the property succeeded to, in the case of realty the charge was to be assessed only on the basis of succession to a life interest. The provision for

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assessment contained in s. 21 affords a reason for the restriction of s. 14 to successions to personalty.

I proceed now to examine somewhat more closely the language of s. 15. The latter part of that section provides that where any succession shall, before the successor shall have become entitled thereto (i.e., to the succession already conferred) in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created.

My Lords, as I have already stated, a part of the succession to which the co-heiresses were entitled became vested by alienation in the appellant. The case, therefore, seems to come within the very words of s. 15. For I can see no ground for a distinction between the transfer by alienation of the right to receive the whole of the personalty which is the subject of the succession or a part of it. It was argued on behalf of the Crown that the word "alienation" must be confined to alienation for valuable consideration; that the words "not conferring a new succession" qualified the word "alienation" as well as the words which immediately follow it; and that every gratuitous alienation must create a new succession substituted for the one from which it was derived.

I have already given reasons for thinking the last of these propositions ill-founded. If the word "alienation" was only intended to apply to cases in which it was in respect of a money consideration, why were no words to that effect inserted? I think there is no warrant for putting any limitation upon the word which is not found in the terms of the section.

As in my opinion no new succession was created in the money to which the appellant has become entitled, it is immaterial whether the words "not conferring a new succession" do or do not qualify the word "alienation." But I think it right to state that, in my opinion, they do not; and the fact that they do not strengthens the arguments which I have adduced as to the scheme of the legislation.

It is certainly not construing the words "by alienation or by

any title not conferring a new succession" according to their grammatical meaning to refer the words "not conferring a new succession" to "alienation" as well as to "by any title." And if I am right in thinking that mere alienation of an existing succession does not of itself create a new succession, then the section may be construed according to its grammar, and is drawn in the manner one would have expected.

It is true that Sir George Jessel, in the case already referred to, expressed the opinion that the words "not conferring a new succession" apply to the word "alienation" as well as to the words "any title," though he confessed that in that view the grammar was not perfect or beyond criticism. The reason he gave was that it would be very difficult to say what title there could be conferring a new succession if not an alienation. I do not think the reason a sound one. A succession might, for example, before it fell into possession have devolved by death upon another person or persons so as to create a new succession. Such person or persons are termed in s. 14 "other successor or successors." It was necessary to insert after the words "by any title" the words "not conferring a new succession," otherwise there would have been a conflict as regards personalty between the 14th and 15th sections. On the other hand, a succession might by operation of law become vested in some other person, as, for example, an assignee in bankruptcy, which would be a title not creating a new succession. But I can see nothing either in the terms of the section or in the reason of the thing to suggest that an alienation by instrument inter vivos, which merely transferred the interest of the successor or some part of it to some other person, would create a new succession. In such a case the same property passes into possession on the same death, and though by a transaction inter vivos another person is substituted for the original successor, I do not think it can reasonably be said that "a new succession" was thereby conferred.

For the reasons I have given I am of opinion that the 15th section applies, and that the duty payable in respect of the property into the possession of which the appellant came is to be paid at the same rate and time as the same would have

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been payable if no alienation had been made by the co-heiresses and they had themselves become entitled in possession.

I have so far mainly dealt with the case on a consideration of the terms of the statute as if the matter were res integra unaffected by previous decisions. It was, however, argued for the Crown that the case of *Attorney-General* v. *Cecil* (1) was an authority in favour of their contention that the 15th section was inapplicable. I do not think so. In that case, a father and son being tenant for life and tenant in tail under a settlement, the entail was barred and the estates settled to their joint appointment, and subject thereto to the uses of the earlier settlement. They afterwards appointed a term to a trustee on trust to raise 20,000*l.* for a younger son. On the money becoming payable to him upon the death of the original tenant for life, the question arose whether duty was payable at 3 per cent. as upon a succession derived from his brother, or at 1 per cent. only. The Court held the former duty payable.

It was contended that s. 15 applied, and that the same duty only was payable as the tenant in tail would have paid on succession to the entailed estates. That case seems to me far removed from the present one. It was impossible to say with any reason that Lord Eustace Cecil succeeded to the 20,000*l.* by reason of the vesting in him by alienation of a portion of the succession to which his brother was entitled under the original settlement. If the entire interest of the tenant in tail under that settlement had been conveyed to Lord Eustace Cecil he would have taken nothing at all, in the event which happened, inasmuch as the tenant in tail died without issue in the lifetime of the tenant for life.

By the disintailing deed the estate of the tenant in tail became enlarged to an estate in fee. If he had survived his father he would have taken within the meaning of the 12th section under a disposition made by himself, and not under the original settlement. How, therefore, could it be said that the charge created in favour of Lord Eustace Cecil vested in him by alienation the succession to which the tenant in tail was entitled under the original settlement, or any part thereof? The

(1) L. R. 5 Ex. 263; 39 L. J. (Ex.) 201, 204.

decision in no way conflicts with the conclusion at which I have arrived.

There may have been some divergence in the reasons given by the learned judges in the case which I have been considering for the conclusion at which they arrived, but there is nothing really inconsistent with the construction which I have put upon the 15th section. On the contrary, according to the report of the case in the *Law Journal*, which is fuller than that in the LAW REPORTS, Kelly C.B. said: "If the charge had been made or the term had been created out of the original succession, it would have come strictly within the words of this section of the Act (i.e., the 15th section), and would have created no new succession at all."

In *Braybrooke* v. *Attorney-General* (1) Lord Wensleydale said that the 15th section was meant to meet the simple case of a person having a right to a succession within the meaning of the Act totally alienating that right to another person before the succession opens, or carving out a derivative interest from it—in which case the section provides that the assignee or the person having the derivative title shall stand on the same footing as the assignor. But if there is something different from a mere transfer of the interest or a part of it, if there is a title conferring a new succession in any other person, then the 15th section does not apply.

In *Attorney-General* v. *Yelverton* (2) Martin B., in delivering the judgment of the majority of the Court, said of the 15th section: "It seems to us to refer to a species of property different from that on which the duty is claimed in the present case, that is to say, a reversionary property in respect of which the assignor would have been liable to duty but which he has assigned."

There is thus a considerable weight of judicial opinion in support of the views I have expressed. The scheme of the Act, as I have presented it to your Lordships, appears to me to be clear, consistent, and equitable, and it is arrived at by giving to the provisions which impose the duty and which determine

(1) 9 H. L. C. 178. (2) 7 H. & N. 329.

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its rate and time of payment, and the persons who are to be accountable for it, their natural grammatical meaning.

Having arrived then at the conclusion that duty was payable at the same rate and time as if the co-heiresses had made no alienation, the only question which remains is whether the payment of legacy duty at 3 per cent. on the entire residuary estate of the testator renders the duty of 3 per cent., which would otherwise have been payable on the succession in question, no longer payable. This depends on the concluding provision of s. 18. It enacts that "no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property." It is clear that the co-heiresses could not have been called on to pay any further duty on the property which they assigned to the appellant. Having paid the legacy duty, no succession duty would have been payable by them at the time of Lady Wolverton's death or any other time. If I am right in the view which I have expressed that the alienation did not create a new succession, it seems to me to follow that the Crown cannot be entitled both to legacy and succession duty in respect of the acquisition of the same property, on the same death, whether by the successor or his assignee. I think any other conclusion would be unreasonable, and contrary to the manifest intention of the enactment.

For the reasons I have given I think the judgment ought to be reversed and judgment entered for the defendant, with costs.

LORD MACNAGHTEN. My Lords, "The Act," it has been observed, "is a difficult Act, and the dicta are not less difficult to consider than the Act itself." (1) So said a distinguished judge speaking of the Succession Duty Act, 1853. I cannot help thinking there is a good deal of truth in that saying, and just a touch of warning, which the author of the observation himself might sometimes perhaps (if I may venture to say so) have kept in view without impropriety. Happily the

(1) 4 Ch. D. 802, 823.

provisions of the Act bearing upon the question now before the House do not present any very great difficulty, and even the dicta are less embarrassing than usual.

The disposition which your Lordships have to consider in connection with the Act relates to the residuary estate bequeathed by the will of the second Lord Wolverton, who died in November 1887. He left a widow, but no issue. He was succeeded in the title by his nephew. The third Baron died unmarried in July 1888. His successor was his brother, the present appellant.

Under the limitations contained in the testator's will the third Baron would have become entitled to the testator's residuary estate, which was of very great value, if he had survived the testator's widow. But by reason of his death in her lifetime the whole residuary estate, subject to the widow's life interest, came to be held in trust for the person who might at the time of the widow's death answer the description of the testator's "right heir at common law."

Now, the co-heiresses of the testator at the time of his death, and at the time of the death of the third Baron, were the five daughters of the testator's next brother, who had died in the testator's lifetime without male issue. If they had never existed, the third Baron, and after him the appellant, would have been the testator's heir-at-law.

In this state of things, in order to carry out what was supposed to have been the testator's intention and to prevent the property passing away from the title, and in order at the same time to make suitable provision for the co-heiresses, a family arrangement was come to between the co-heiresses, the appellant, and the testator's widow. The co-heiresses and the appellant brought in their contingent interests, and the widow gave up her life interest in certain bank shares producing an income of over 50,000*l.* which had fallen into the residue on the death of the third Baron. The scheme of the arrangement was this: The income of the bank shares was to be used to pay an annuity of 15,000*l.* to the appellant and annuities to the co-heiresses during the widow's life; the surplus income during her lifetime was to be accumulated. On the death of

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the widow certain capital sums were to be paid to the co-heiresses out of the accumulated fund, supplemented, if necessary, by the accumulation of the surplus income of the entire estate after payment thereout of an annuity of 15,000*l.* to the holder of the title for the time being during the period of accumulation; subject to these provisions the property was to be settled so as to go along with the title. The arrangement was embodied in a deed dated December 31, 1888, by which the widow assigned to trustees her interest in the bank shares, and the co-heiresses and the appellant assigned to the same trustees all their interest in the testator's residuary estate.

The testator's widow died on January 4, 1894. The five co-heiresses survived her. The accumulated fund was then insufficient to answer the claims of the co-heiresses; and so a further period of accumulation commenced, during which the appellant as the holder of the barony became entitled under the trusts of the deed of arrangement to the annuity of 15,000*l.* payable out of the testator's residuary estate.

On the death of the widow the Commissioners of Inland Revenue claimed and received legacy duty at the rate of 3 per centum on the whole of the testator's residuary estate. In addition to the legacy duty so claimed and paid, the Commissioners claimed succession duty upon the annuity of 15,000*l.* as upon a succession coming to the appellant from the testator's widow, or from the co-heiresses, or from both the widow and the co-heiresses. The claim was held good in the Queen's Bench Division and in the Court of Appeal. The matter now remains for your Lordships' determination.

The question depends simply on the effect of two sections of the Succession Duty Act, the 15th and the 18th.

Sect. 15 enacts that "where . . . . any succession shall before the successor shall have become entitled thereto or to the income thereof in possession, have become vested by alienation or by any title not conferring a new succession in any other person, then the duty payable in respect thereof shall be paid at the same rate and time as the same would have been payable if no such alienation had been made or derivative title created."

I may observe in passing, with all deference to Sir George Jessel M.R., that I cannot see any reason why the expression "not conferring a new succession" should be read as qualifying the word "alienation" as well as the words "any title." Not that that construction would make any practical difference. But it is not wanted: it rather confuses the meaning, and it is forbidden by the structure of the sentence according to the ordinary rules of grammar. A mere alienation—a mere transfer of a subsisting succession—cannot confer a new succession. But a new succession may, of course, be conferred by a title in which alienation is followed by a transmission of interest before the succession vests in possession.

My Lords, it seems to me that the case which your Lordships have before you is precisely the case contemplated in the 15th section of the Act. I do not think that the transaction in respect of which the commissioners are now claiming succession duty could be described more accurately than in the very words of that section. The succession of the co-heiresses, that is to say, the residuary estate of the testator to which, at the date of the deed of arrangement, the co-heiresses were contingently entitled, and which was chargeable with duty on the death of the widow, became to the extent of 15,000*l.* per annum vested by alienation in the appellant as the holder of the barony before the co-heiresses became entitled thereto in possession; and, therefore, if the 15th section had stood alone, the duty payable in respect thereof to the extent of the annuity would have had to be paid at the same rate and time as the same would have been payable if the deed of arrangement had not been executed and no such alienation had been made. But then the provision at the end of the 18th section comes in, which enacts that no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by the Succession Duty Act in respect of the same acquisition of the same property. Now, if the alienation in question had not been made, and if the whole of the testator's residuary estate had come to the co-heiresses, they could not have been charged with succession

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duty on any part of their succession. The charge for succession duty would have been cleared by the payment of legacy duty. It follows, therefore, from the combined operation of the 15th and 18th sections, that no succession duty can now be claimed in respect of the annuity of 15,000*l.* payable to the appellant as from the widow's death out of the income of the testator's residuary estate.

Speaking for myself, I hardly think it necessary to say anything more. And, indeed, I should not have supposed the question open to argument if it had not been argued so strenuously on the part of the Crown. However, as the claim for duty has been made, and made with success in both the Courts below, it would scarcely be respectful to omit all reference to the judgments under review.

In the Queen's Bench the ground of decision, which I believe commends itself to your Lordships, though argued, was not even noticed in the judgment of the Court. It was supposed by the Court—I do not know why—that the defence rested on two grounds, and two grounds only. One was that the annuity which became payable after the widow's death out of the succession of the co-heiresses was the same annuity which was payable during her lifetime out of the income of the bank shares, and that in fact there was only one annuity. The other was that the annuity payable after the widow's death was payable under a contract for valuable consideration in money or money's worth within the meaning of s. 17. Both those grounds were plainly untenable, and both were properly rejected by the Court of Queen's Bench.

In the Court of Appeal the same arguments were repeated. They met with much the same fate. And the real ground of defence fared little better there than it did in the Queen's Bench. It suffered, I think, from being found in bad company. All the learned judges of the Court of Appeal say that Lord Wolverton's annuity was "a new succession," because it was not a continuation of the old annuity, but came into existence for the first time at the widow's death. That, however, was not the point. The point was that the annuity to which Lord Wolverton became entitled after the widow's death was carved

out of the succession of the co-heiresses, and was merely an alienation of part of their succession.

Besides holding that the annuity was a "new succession," both Lord Esher and Rigby L.J. relied on a proposition—a "larger proposition" Lord Esher calls it—which they attribute, erroneously I think, to Martin B. They both seem to think that Martin B. differed from Lord Wensleydale as to the true meaning of s. 15. Now, Lord Wensleydale's opinion is to be found in his judgment in *Braybrooke* v. *Attorney-General*. (1) In that case he dissented from the majority of the House; but the decision did not turn on the 15th section at all. What he said about s. 15 was obiter dictum, but it was not at variance with anything said by the other noble and learned Lords who took part in the case. The opinion of Martin B., in the view of Lord Esher and Rigby L.J., is to be extracted from one sentence in the report of the case of *Attorney-General* v. *Cecil* (2) as given in the LAW REPORTS. From that sentence, divorced from the context, they conclude that Martin B.'s opinion was that an alienation in a family settlement was not an alienation within the meaning of s. 15. With all deference to the Court of Appeal, I must say that I can find no foundation for such a singular notion either in the Act itself or in anything that fell from Martin B.

There was, no doubt, one point which came under discussion in connection with the Succession Duty Act on which Martin B. did differ from Lord Wensleydale, but that point had no reference to s. 15. The point of difference, as explained very fully by Lord Selborne in *Charlton* v. *Attorney-General* (3), was a point upon the general principles of law applicable to the execution of powers. On that Lord Wensleydale differed, not only from Martin B., but also from Lord Cranworth and the House of Lords.

The report of *Attorney-General* v. *Cecil* (2) in the *Law Journal* (4) seems to be more accurate than that in the LAW REPORTS. The expression attributed to Martin B. in the LAW REPORTS, in which Lord Esher and Rigby L.J. discover

(1) 9 H. L. C. 150.
(2) L. R. 5 Ex. 263, 272.
(3) 4 App. Cas. 444.
(4) 39 L. J. (Ex.) 201, 205.

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a difference of opinion between that learned judge and Lord Wensleydale, and on which to some extent their judgment is based, is not to be found in the report in the *Law Journal*. In the corresponding passage in the *Law Journal* Martin B. actually expresses his concurrence with Lord Wensleydale, referring obviously to the passage in *Braybrooke* v. *Attorney-General* (1) where the noble and learned Lord deals with s. 15. That section, he says, was meant to meet the simple case of a person having a right to a succession within the meaning of the Act totally alienating that right to another person before the succession falls into possession, or carving out a derivative interest from it: in which case, his Lordship observes, "the section provides that the assignee or the person having the derivative title shall stand on the same footing as the assignor. But if there is something different from a mere transfer of the interest or a part of it, if there is a title conferring a new succession on any other person, then the 15th section does not apply."

I think the appeal should be allowed, with costs both here and below.

LORDS MORRIS and SHAND concurred.

Decree of the Queen's Bench Division and order of the Court of Appeal reversed with costs here and below; Cause remitted to the Queen's Bench Division.

Lords' Journals, July 12, 1898.

Solicitors for appellant: *Waterhouse, Winterbottom, Harrison & Harper.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) 9 H. L. C. 178.

[HOUSE OF LORDS.]

LORD REVELSTOKE . . . . . APPELLANT;

AND

THE COMMISSIONERS OF INLAND REVENUE . . . . . RESPONDENTS.

H. L. (E.) 1898 July 14.

Revenue—Stamp Duty—Foreign Security made or issued in United Kingdom—Stamp Act 1891 (*c.* 39) *s.* 82 *sub-s.* 1 (*b*) (i.).

Bonds of a foreign company payable to bearer were executed by the company abroad and delivered abroad to a foreign trustee for the bondholders. The bonds were expressed not to be valid for any purpose unless authenticated by the certificate of the trustee. Some of the bonds were sent to England and the trustee having come to England there certified them and delivered them to the persons entitled to them:—

Held that since the bonds were not marketable till they were certified, the bonds certified in England were "marketable securities by a foreign company which were made and issued in the United Kingdom" within the meaning of the Stamp Act 1891 s. 82 sub-s. 1 (*b*) (i.) and liable to the stamp duty imposed by that Act upon such securities.

The decision of the Court of Appeal, *Baring* v. *Commissioners of Inland Revenue*, [1898] 1 Q. B. 78, affirmed.

THE Atchison Topeka and Santa Fé Railroad Company (incorporated under Kansas laws) being in arrear in payment of interest upon their mortgage bonds, a plan of reorganisation was agreed upon, whereby a new railway company was to be incorporated, the holders of bonds in the old company to deposit them with certain firms and to receive new bonds to be given by the new company (upon terms not material to this report).

The plan was carried out and bonds for one thousand dollars payable at the new railway company's office in New York to the bearer or, if the bond were registered, to the registered holder, and bearing interest at 4 per cent. payable at the said office, were drawn up. Each bond expressed that it was one of a series of bonds issued and to be issued in pursuance of, and all to be equally secured by, a mortgage or deed of trust dated December 12, 1895, executed by the new railway company to the Union Trust Company of New York, as trustee, covering the property and franchises of the new railway

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company. Each bond contained the words "This bond shall not be valid for any purpose unless authenticated by the certificate hereon indorsed of the trustee under said mortgage or deed of trust." The certificate indorsed certified that the bond was one of the series of bonds described in the mortgage or deed of trust, and space was left for the signature of the trustee. The bonds were executed by the new railway company and handed to the Union Trust Company of New York. Some of the bond-holders of the old company being in England their new bonds had to be sent to Baring Brothers & Co., Limited, in London, one of the firms of depositaries, for distribution to those entitled in return for their certificates of deposit of the old bonds. To avoid the heavy insurance premium for transmission of signed bonds the bonds were sent unsigned, and Mr. Merritt, Vice-President of the Union Trust Company, went to London and there signed the certificates. One of these bonds thus signed was delivered to the appellant in return for his certificate of deposit.

The Commissioners of Inland Revenue assessed a duty of 1*l.* 1*s.* upon the bond under the Stamp Act 1891 (c. 39) at the rate of 1*s.* for every 10*l.*, the bond being valued at 204*l.* 3*s.* 4*d.* The commissioners having stated a case (which is set out in the report of the Court below (1)) for the opinion of the Court, the Queen's Bench Division (Wright and Ridley JJ.) held that the bond was rightly assessed, and this decision was affirmed by the Court of Appeal (A. L. Smith, Rigby, and Collins L.JJ. (1))

By the Stamp Act 1891 c. 39 s. 82 sub-s. 1 "Marketable securities for the purpose of the charge of duty thereon include. . . . .

"(*b*) A marketable security by or on behalf of any foreign State or Government, or foreign or colonial municipal body, corporation, or company (hereinafter called a foreign security) bearing date or signed after the 3rd day of June 1862,

"(i.) Which is made or issued in the United Kingdom. . . . ."

Cohen Q.C. and *Bray Q.C.* (*Willes Chitty* with them) for the

(1) [1898] 1 Q. B. 78.

appellant. The bonds were executed by the new railway company in America and then handed to the Trust Company for signature by the Trust Company and delivery to the persons entitled. The bonds were then complete so far as the new railway company could make them so. They were certainly "made" in America and they were also "issued" there. The countersigning of the certificate in London by a person over whom the new railway company had no control could not be properly described as an "issue" of the bond. The new company had nothing more to do when they handed the bonds to the Trust Company. The Trust Company was not acting as the agent of the new railway company. "Issue" means a delivery of the instrument coupled with a parting with the control of and property in it. Even assuming that the bonds were not marketable securities until the certificate was countersigned, the countersigning does not amount to an issue. There can only be one issue of the same bond, and the issue of this bond was in America when the new railway company parted with the control of and the property in the bond to the Trust Company: see *Grenfell* v. *Commissioners of Inland Revenue.* (1) The bond was issued in America to take effect when a condition was performed: but the new railway company had nothing to do with the arrangement that that condition should be performed in England. Even if it had the issue would still have been in America.

Sir R. Finlay S.-G. and *Danckwerts* for the respondents were not heard.

EARL OF HALSBURY L.C. My Lords, I do not think there is much difficulty in determining this case. It appears to me that this marketable security was both "made" and "issued" in London. To my mind the origin of this document is as immaterial as the particular quality of the paper on which it was written, or the consideration of where its process of manufacture was originally commenced. The document in question is a document which when completed (I will say in a moment or two when I think it was completed) is undoubtedly within

(1) (1876) 1 Ex. D. 242.

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Earl of Halsbury L.C.

the meaning of the statute a "marketable security"; and the marketable security when completed is for the first time delivered to a person who is entitled to receive it in London. I think that was an "issue" of that marketable security to that person in London. Therefore I think it was "issued" in London.

But I think it was also "made" in London. I think the earlier history of the transaction is immaterial. We are dealing now with a Taxing Act which affixes the necessity of placing a stamp upon a particular instrument of the character designated and defined by the statute itself. The statute has given its test: the instrument must be a "marketable security," and any document which has that character and is "issued" in London or is "made" in London is liable to that tax. As I have already said, I think the document in question was issued in London; but now let us see, was it made in London? Its commencement was in another country. It is not denied and cannot be denied that at the time it first reached this country it did not fill the character which the Act of Parliament has fixed as the character of a document to which the stamp must be applied. That is admitted; and when it got to London it for the first time fell into the category to which the Act of Parliament applies. It required a particular signature; and be it observed here that we are not dealing with those wider questions of what are the contractual relations between the parties to the instrument; we are dealing with a Taxing Act which affixes to a particular instrument of a particular character the necessity of having a stamp. For the first time, in London, this instrument gets that character by a signature affixed in London. For my own part I am wholly unable to understand why, when for the first time it assumes that character in London, and falls within the definition which the Act of Parliament contemplates, as that which renders it liable to a stamp duty—I say I am wholly unable to understand why one should go further than look at the character of the instrument itself and see where, as one of the learned judges says, geographically it first assumed that character; and then if so, was it not "made" (made, that is to say, a marketable security)

in this country? My Lords, for my own part it appears to me to be exceedingly plain. I think it was both "made" and "issued" in this country, and I decline to go into the earlier history of the transaction to see who was a party to the first part of the transaction, and who was a party to the second part of the transaction. To my mind it is enough to say that this document first assumed that character in this country, and in that character was for the first time "issued" in this country to the person entitled to receive it.

Under those circumstances it appears to me, quite independently of the earlier history of the matter, that it fills the character which the Act of Parliament contemplated as that of documents which were to be subject to the stamp duty; and I am therefore of opinion that the judgment of the Court below, though I am not able entirely to follow all the reasoning of the learned judges, was in substance right, and I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion. In my opinion these bonds were both "made" and "issued" in this country within the meaning of the Stamp Act. I think the bonds were "made" when the finishing touch was put to them and they became by the addition of Mr. Merritt's certificate valid and operative instruments as "marketable securities." Then for the first time, it seems to me, they were "issued" as marketable securities. Before that addition was made the bonds on the face of them bore the statement that they were not valid for any purpose. I cannot understand how any document can be issued as a marketable security which proclaims on the face of it that it is not a marketable security at all.

LORD MORRIS. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I am also of the same opinion.

I think there is much room for the argument that these bonds were issued, in the state in which they were issued, in America, because they were documents which were there given over or delivered by debtors practically to their creditors in fulfilment of obligations previously undertaken. The bond in

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question might have been delivered to the appellant himself, but instead of that the bonds were handed to trustees to be held for the appellant and other bondholders in fulfilment of obligations.

But, my Lords, the point on which my judgment turns in the case is this—that when the bonds were so handed and issued to the creditors entitled to them or to trustees for their behoof they were not marketable securities. They became marketable securities only after they arrived in England, when they were made marketable by the certificates there signed; and you therefore had an issue of a document essentially different from that which it had been in America. What had been an unmarketable security was made a marketable security, and then for the first time issued as such in England. It appears to me that in these circumstances the clause of the statute applies, and the stamp duty which the Crown insists upon became due. In short, my Lords, I agree practically with what was said by A. L. Smith L.J. (1): "If when the certificate was indorsed in London by Mr. Merritt it then and there became a marketable security, and was not a marketable security until that period, it became then a marketable security issued in the United Kingdom."

On that ground I am of opinion that the judgment ought to be affirmed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 15, 1898.

Solicitors for appellant: *Bompas, Bischoff & Co.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) His Lordship read the extract from the shorthand-writer's note of the judgments of the Court of Appeal.

[HOUSE OF LORDS.]

THE EASTMAN PHOTOGRAPHIC MATERIALS COMPANY, LIMITED . . } APPELLANTS;

AND

THE COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE-MARKS . . . . . } RESPONDENT.

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Trade-mark—Registration—"Invented Word"—"Reference to the Character or Quality of the Goods"—Costs of Registration and Appeal—Patents, Designs, and Trade Marks Act 1883 (*c.* 57) *s.* 64 *sub-s.* 1, *as amended by Patents, Designs, and Trade Marks Act* (*c.* 50) *s.* 10 *sub-s.* 1.

A word which is "an invented word" within the meaning of clause (*d*) of s. 64 sub-s. 1 of the Patents, Designs, and Trades Marks Act 1883, as amended by the Patents, &c., Act 1888 s. 10 sub-s. 1, may be registered as a trade-mark, although it "has reference to the character or quality of the goods" within clause (*e*). Clauses (*d*) and (*e*) are independent of each other.

The word "Solio" *held* to be capable of registration as a trade-mark under class 39 in respect of photographic paper, and the decision of the Court of Appeal reversed.

The term "invented word" discussed.

In re Farbenfabriken Application, [1894] 1 Ch. 645, overruled.

The appellants having applied to the Comptroller of Patents, Designs, and Trade Marks to register "Solio" as a trade-mark in class 39 in respect of photographic paper, the comptroller referred them to s. 64 of the Patents, &c., Act of 1883, as amended by s. 10 of the Patents, &c., Act of 1888, "from which you will see that the mark you propose does not consist of any of the essential particulars required as a condition of the registration of a new trade-mark," and refused the application. An appeal to the Board of Trade having been referred by the Board to the Court, Kekewich J. refused the application with costs, and this decision was affirmed by the Court of Appeal (Lindley, Lopes and Rigby L.JJ.) with costs, those learned judges being of opinion that "Solio" suggested "Sol," the sun, and therefore had "reference to the character or quality of the goods" within

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s. 10 sub-s. 1 (*e*) of the Act of 1888, and therefore that even assuming "Solio" to be an "invented word" within clause (*d*) of that section it could not be registered, upon the authority of the "Somatose" Case, *In re Farbenfabriken Application* (1), and the "Mazawattee" Case, *In re Densham's Trade-mark*. (2) There was evidence that the name "Solio" was first suggested to the appellants on seeing the word "Soho" (where the firm had once done business) so written that it looked like "Solio."

June 24, 28. *Moulton Q.C.* and *D. M. Kerly* for the appellants. This appeal raises the question whether the decision of the Court of Appeal in the "Somatose" Case (1) and the reasoning in the "Mazawattee" Case (2) are right, namely, that clauses (*d*) and (*e*) in s. 64 sub-s. 1 of the Patents, Designs, and Trade Marks Act 1883, as amended by s. 10 sub-s. 1 of the Patents, &c., Act 1888, enact that an "invented word" cannot be registered as a trade-mark if it "has any reference to the character or quality of the goods." Sect. 10, sub-s. 1 amends s. 64 sub-s. 1 so that it reads, "For the purposes of this Act a trade-mark must consist of or contain *at least one* of the following essential particulars . . . .

"(*d*) An invented word or invented words; *or*

"(*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name."

Can anything be clearer than that any one of the specified essential particulars is enough; that the two clauses are independent and that the decision in the "Somatose" Case (1) was wrong? The error began with Kay J. in *In re Meyerstein's Trade-mark* (3), where the decisions on different language in the Act of 1883 were imported into the Act of 1888. Those decisions have no bearing on the question. But even if clauses (*d*) and (*e*) were not independent and if "or" meant "and," "Solio" ought to be registered, for it has no reference to the character or quality of the goods.

[EARL OF HALSBURY L.C. "Solium" in Latin and "solio" in Italian mean a throne, a royal seat.]

(1) [1894] 1 Ch. 645. (2) [1895] 2 Ch. 176.
(3) (1890) 43 Ch. D. 604.

And neither of those words has any reference to photographic paper or to the sun. The word was suggested by "Soho" written so as to look like "Solio."

Sir R. E. Webster A.-G. and *Sir R. Finlay S.-G.* (*Ingle Joyce* with them) for the respondent. "Solio" is not an "invented word" within the meaning of the Act; it is simply "Sol," the sun, with two letters added, and manifestly refers to the sun and sun-pictures. Thousands of words similarly made up, some of which are on the border-line, are rejected yearly. The construction put by the Court of Appeal on the Act of 1888 was right: it never was intended to overrule the series of decisions rejecting "fancy" words which were descriptive. A truly "invented word" has no meaning and therefore cannot refer to the character or quality of the goods. If therefore a trade-mark has reference to the character or quality of the goods it cannot be an "invented word" within clause (*d*). If the House reverses the decision of the Court of Appeal there is no power to give costs: *In re Rotherham's Trade-mark.* (1)

The House took time for consideration without hearing a reply.

July 15. EARL OF HALSBURY L.C. My Lords, this is an appeal from the Comptroller-General of Patents, Designs, and Trade-Marks, who has refused to the appellants to permit the word "Solio" to be registered as applicable to their photographic paper.

Before dealing with the decision itself I think it desirable, from what occurred in the course of the argument, to say something as to what sources of construction we are entitled to appeal to in order to construe a statute. Among the things which have passed into canons of construction recorded in *Heydon's Case* (2), we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed, and the reason of the remedy.

Now the law before the Act now in question was passed was

(1) (1880) 14 Ch. D. 585. (2) 3 Rep. 18.

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one which had given rise to considerable litigation and is contained in s. 64 of the Patents, Designs, and Trade Marks Act 1883. Sect. 64 of that Act provided that a trade-mark must consist of or contain at least one of the following essential particulars. Clause (*c*): "A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." That was the law passed in 1883, and on February 24, 1887, a commission was appointed to inquire into the duties, organisation, and arrangements of the Patent Office under the Trade Marks Act so far as related to trade-marks and designs.

It appeared by the report of the commissioners that complaints had been made as to the working of the Act of 1883, and in that part of the report relevant to the present controversy (1) it is stated that "the most difficult question which has arisen upon the enactment under consideration is to determine what may be properly regarded as 'fancy words.' Words are, undoubtedly, a most popular form of trade-mark, but some limit must obviously be put upon the words which an individual may be permitted to register and claim the exclusive use of. The expression 'fancy word' is certainly not a happy one and has naturally given rise to considerable differences of opinion as to its meaning." The report proceeds: "It is manifest that no one ought to be granted the exclusive use of a word descriptive of the quality or character of any goods. Such words of description are the property of all mankind, and it would not be right to allow any individual to monopolise them and exclude others from their use. Again, geographical words, which can be regarded as descriptive of the place of manufacture or sale of the goods, are open to obvious objections. One manufacturer or merchant cannot properly be allowed to prevent all his competitors from attaching to their goods the name of the place of their manufacture or sale. The mischief would not be the same where the person seeking to register was the first who had manufactured or sold the goods in the place the name of which he seeks to appropriate as a trade-mark. But there are objections to giving a monopoly even in that case; and to attempt to draw any such distinction would be likely to

(1) Report, March 16, 1888, s. 26.

lead to difficulty and litigation. We think, therefore, that geographical names ought only to be permitted where they clearly could not be regarded as indicative of the place of manufacture or sale. We would add upon this point that we think that where any English word would be rejected as not entitled to registration, no person ought to be permitted to register its translation into any other language. The question has been raised whether a word having the same sound as one entered on the register, though differently spelt and with a different meaning, should be registered. The question in such a case would seem to be whether the resemblance between the old mark and that applied for was such as to be calculated to deceive; if it were it ought, of course, to be rejected." My Lords, I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission.

Turner L.J. in *Hawkins* v. *Gathercole* (1), and adding his own high authority to that of the judges in *Stradling* v. *Morgan* (2), after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case: that the judges have collected the intention "sometimes by considering the cause and necessity of making the Act . . . . sometimes by foreign circumstances" (thereby meaning extraneous circumstances), "so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion." And he adds: "We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject." Lord Blackburn in *River Wear Commissioners* v. *Adamson* (3) says: "In all cases the object is to see what is the intention

(1) (1855) 6 D. M. & G. 1, 21. (2) (1584) 1 Plowd. 204.
(3) (1877) 2 App. Cas. 743, 763.

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expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view."

My Lords, it appears to me that to construe the statute now in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provided the remedy. These three things being compared, I cannot doubt the conclusion.

Now the objection pointed out by the commissioners was that a particular individual could not be permitted to take exclusive possession of any part of our language; and this objection appears to have been in the mind of the framers of the earlier statute when they made the phrase "fancy word" part of the definition of what might be registered as a trade-mark. It was the use of that phrase and its accompanying qualification which gave rise to much litigation, and I am certainly not disposed to hold that cases decided under that Act can have any bearing upon the construction of that part of the Act now under consideration, which was obviously intended as an alteration and amendment of the former Act.

The present Act provides, among other things, by s. 10, that a trade-mark must consist of or contain at least one of certain particulars, one of which is "an invented word or invented words." This word "Solio" is claimed to be an invented word; and it has been adjudged not to be an invented word, and apparently (though I think the association of the two things involves an incorrect construction of the statute) because it is a word which has reference to the character or quality of the goods.

My Lords, I think it is an invented word within the meaning of this statute. I know of no such word as "Solio" in any sense which would make it intelligible here, although it is an Italian word meaning a throne, and although it is a Latin word in the ablative case with the same meaning.

Not much reliance, however, is placed upon the word having some meaning in a foreign tongue; but what is put is that it may have extracted from it some meaning in relation to the character or quality of the goods, because the letters S, O, L may be understood to mean the sun, and that Shakespeare in *Troilus and Cressida* speaks of our planet "Sol" (1), and that inasmuch as the goods in question are photographic papers and sunlight is operative in producing impressions on photographic paper, Solio comes within the prohibition against using words which are distinctive of the character and quality of the goods in respect of which the word is sought to be registered.

My Lords, my answer is that "Solio" is not "Sol," and "Sol" is not "Solio." It certainly is a very strange thing that you should take three letters out of a word, and, by the somewhat circuitous process that has been adopted here, arrive at the conclusion that it is not an invented word and that it does describe the character and quality of the goods.

My Lords, I desire to give my opinion with reference to the particular word, and not to go behind it. I can quite understand suggesting other words—compound words, or foreign words, as to which it would be impossible to say that they were invented words, although perhaps never seen before, or that they did not indicate the character or quality of the goods, although as words of the English tongue they had never been seen before. Suppose a person were to attempt to register as a single English word "Cheapandgood," or even without taking so gross an example, using a word so slightly differing from an ordinary and recognised word as to be neither an invented word nor, avoiding the prohibited choice of a word, indicating character or quality. The line must be sometimes difficult to draw; but to my mind the substance of the enactment is intelligible enough, and the comptroller has to make up his mind whether in substance there has been an infringement of the rule. Of course also words which are merely misspelt, but which are nevertheless, in sound, ordinary English words,

(1) Act 1, Sc. 3.

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and the use of which may tend to deceive, ought not to be permitted.

I am satisfied in this case to say that the word "Solio" is an invented word; that it does not indicate the character or quality of the goods, and that the decision of the Court of Appeal ought to be reversed.

LORD HERSCHELL. My Lords, the Comptroller-General of Patents, Designs, and Trade Marks, having refused to register "Solio" as a trade-mark in respect of photographic paper, the applicants, who are the appellants at your Lordships' bar, appealed to the Board of Trade, who referred the appeal to the Court. Kekewich J. held that the application had been rightly refused, and his judgment was upheld by the Court of Appeal. The ground upon which the Courts proceeded was that the word "Solio" had reference to the character or quality of the goods, and was therefore incapable of registration.

The Court of Appeal held itself bound by a previous decision of the same Court in the case of *In re Farbenfabriken Application* (1) to hold that an invented word could not be registered if it had any reference to the character or quality of the goods. The question turns upon the construction of the section which by s. 10 of the Act of 1888 is substituted for s. 64 of the Patents, Designs, and Trade Marks Act of 1883.

The section to be construed provides that a trade-mark "must consist of or contain at least one of the following essential particulars." Then follow several particulars distinguished by the letters (*a*) to (*e*). The last two of these are as follows: "(*d*) An invented word or invented words, or (*e*) A word or words having no reference to the character or quality of the goods and not being a geographical name."

Before considering the effect of this legislation, I think it well to refer to the fact that these two particulars of which a trade-mark may consist were not to be found in the Act of 1883. On the other hand, "fancy word or words not in common use," which were amongst the essential particulars in

(1) [1894] 1 Ch. 645.

s. 64 of the Act of 1883, are not to be found in the substituted section. It had been held that they did not cover words which were descriptive, and the section had given rise to much litigation and some divergence of judicial opinion.

I cannot doubt that this was the origin of the legislation by which the words appearing in the principal Act were omitted, and the provision found in the later Act substituted.

In the *Farbenfabriken Case* (1), North J. said he did not see how he could hold "somatose" to be an invented word within clause (*d*), having regard to the decisions with respect to such words as "Herbalin," "Washerine," and "Valvoline." All these decisions had reference to the provisions of s. 64 of the Act of 1883 with regard to fancy words. In my opinion none of the decisions upon that part of the original section have any bearing on the new provisions to be found in the substituted section, the purpose of which was, I think, to get rid of expressions which had occasioned much embarrassment, and of all the distinctions and decisions which had been founded upon them. Those decisions, so far from affording any guide to the true interpretation of the particulars designated (*d*) and (*e*), are likely to lead to error if applied to these new provisions.

Addressing myself, then, to the terms of the substituted section, I am unable to find any justification for qualifying the provision "(*d*) an invented word or words" by the condition that they shall have no reference to the character or quality of the goods.

By the words which introduce the section, the particulars designated under the headings (*a*) to (*e*) are treated as separate and distinct: "A trade-mark must consist of at least one of the following essential particulars." What warrant is there, then, for transferring words found in any one of these particulars to any other of them? With all deference to the learned judges who have thought otherwise, I can see none. It seems to me to involve an interpretation of the language used which is not its natural grammatical construction. In the *Farbenfabriken Case* (1) A. L. Smith L.J. said: "It is impossible, I think, to hold that the Legislature intended that an invented

(1) [1894] 1 Ch. 645, 658.

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word might be a word having reference to the character and quality of the goods, whereas a non-invented word might not. There would be no sense in so holding." I am unable to agree with this view. There seems to me to be the broadest distinction between the two cases. Under (*e*) any word in the English language may serve as a trade-mark—the commonest word in the language might be employed. In these circumstances it would obviously have been out of the question to permit a person by registering a trade-mark in respect of a particular class of goods to obtain a monopoly of the use of a word having reference to the character or quality of those goods. The vocabulary of the English language is common property: it belongs alike to all; and no one ought to be permitted to prevent the other members of the community from using for purposes of description a word which has reference to the character or quality of goods.

If, then, the use of every word in the language was to be permitted as a trade-mark, it was surely essential to prevent its use as a trade-mark where such use would deprive the rest of the community of the right which they possessed to employ that word for the purpose of describing the character or quality of goods. But with regard to words which are truly invented words—words newly coined—which have never theretofore been used, the case is, as it seems to me, altogether different; and the reasons which required the insertion of the condition are altogether wanting. If a man has really invented a word to serve as his trade-mark, what harm is done, what wrong is inflicted, if others be prevented from employing it, and its use is limited in relation to any class or classes of goods to the inventor? So far, then, from seeing no reason for a distinction between the particulars designated in (*d*) and (*e*), there seems to me abundant reasons for not interpolating in (*d*) words which the Legislature has used only in relation to (*e*).

In a later part of the judgment to which I have already referred, A. L. Smith L.J. says that to constitute an invented word, within the meaning of the section, it must be a word coined for the first time. "Such a word," he says, "is of necessity incapable of having reference to the character or

quality of goods, because, ex hypothesi, it is an entirely new unknown word incapable of conveying anything." With this —subject to a qualification to which I will refer in a moment— I entirely agree. An invented word has of itself no meaning until one has been attached to it. But this circumstance does not seem to me to be any ground for qualifying with a condition not applied to them the terms "an invented word or words."

In considering the case of an application to register a trade-mark under (*d*), the only question which, in my opinion, has to be determined is whether the word sought to be registered is an invented word. In one of the cases on this subject Kay L.J. said (1), "there is extremely little invention in the matter." It may be that the word "Satinine," which was there in question, was objectionable on other grounds; but if the word be an "invented" one, I do not think the quantum of invention is at all material. An invented word is allowed to be registered as a trade-mark, not as a reward of merit, but because its registration deprives no member of the community of the rights which he possesses to use the existing vocabulary as he pleases.

It may, no doubt, sometimes be difficult to determine whether a word is an invented word or not. I do not think the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form. Again, I do not think that a foreign word is an invented word simply because it has not been current in our language. At the same time, I am not prepared to go so far as to say that a combination of words from foreign languages so little known in this country that it would suggest no meaning except to a few scholars might not be regarded as an invented word. It is in this respect that I desire to qualify my assent to A. L. Smith L.J.'s proposition that an invented word can never have a meaning.

(1) 43 Ch. D. 605.

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Coming now to the particular case under discussion, I cannot doubt that the word "Solio" is an invented word, unless it is to be regarded as the Italian word "solio," which means a throne, in which case it has certainly no reference to the character or quality of photographic paper. If it is not to be so regarded, it has of itself no meaning. As I have said, I think it unimportant, if it be an invented word, whether it has reference to the character or quality of the goods or not; but if this were the test of the validity of the word as a trade-mark, I must say that I think there is no such reference. I dare say that it might occur to some minds given to etymology that "sol," the Latin for sun, was a component part of it when they found it connected with photographic paper; but the same minds would equally find other root bases for the word if they found it connected with boots or agricultural implements. It seems to me to have no reference to the character or quality of the goods in the sense in which those words must have been used by the Legislature. I think the judgment appealed from ought to be reversed.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

In 1883 the Legislature for the first time allowed persons to register as trade-marks words not used as trade-marks before August 1875. The privilege was conferred by adding to the words "a distinctive device, mark, brand, heading, label, ticket" which were substantially taken from the Act of 1875, the words "or fancy word or words not in common use." To be capable of registration as a new trade-mark it was therefore required by the Act of 1883 that the word proposed to be registered should be a "fancy word" "distinctive" and "not in common use." Everybody knows the trouble which that enactment gave. In trying to construe it the Courts were almost driven to despair, until at last in the Court of Appeal two learned judges declared that to be a fancy word a word must be "obviously meaningless," though one of those two learned judges seems to have retracted or qualified his opinion before the next case was called on.

For these very troublesome words in the Act of 1883 the Act

of 1888 substituted the expression "an invented word or words." It made the substituted expression a separate, independent, and sufficient condition of registration. And now if a proposed trade-mark consists of or contains an invented word or invented words it is capable of registration. But the word must be really an invented word. Nothing short of invention will do. On the other hand, nothing more seems to be required. If it is an invented word, if it is "new and freshly coined" (to adapt an old and familiar quotation), it seems to me that it is no objection that it may be traced to a foreign source, or that it may contain a covert and skilful allusion to the character or quality of the goods. I do not think that it is necessary that it should be wholly meaningless. To give an illustration: your Lordships may remember that in a book of striking humour and fancy which was in everybody's hands when it was first published there is a collection of strange words where "there are" (to use the language of the author) "two meanings packed up into one word." No one would say that those were not invented words. Still they contain a meaning—a meaning is wrapped up in them if you can only find it out.

The object of putting a restriction on words capable of being registered as trade-marks was of course to prevent persons appropriating to themselves that which ought to be open to all. There is a "perpetual struggle" going on, as Fry L.J. has observed, "to enclose and appropriate as private property certain little strips of the great open common of the English language." "That," he added, "is a kind of trespass against which I think the Courts ought to set their faces." (1) And I think the Legislature has set its face against it both in the Act of 1883 and in the Act of 1888. There is little danger of the apprehended mischief if invention be required as a condition of registration. After all, invention is not so very common.

Turning to the present case, I think the word "Solio" may pass for an invented word, and not the less so because it was hit upon by a lucky accident. I should think so even if I thought that it contained in itself an obscure reference to the

(1) 41 Ch. D. 455.

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great source of light while the goods were intended to be used for photographic purposes. But, speaking for myself, I must confess that without explanation from others, better scholars it may be, or worse, it never would have occurred to me to connect "Solio" with the Latin word for the sun.

I therefore agree in the motion proposed.

LORD MORRIS. My Lords, I am of opinion that upon the true construction of s. 10 of the Act of 1888, clauses (*d*) and (*e*) of s. 10 are independent of each other, and thus no portion of (*e*) can be introduced into (*d*). The two clauses represent different heads, which entitle the trade-mark to be registered. Clause (*d*) refers to an invented word simpliciter; clause (*e*) refers to a word or words having no reference to the character or quality of the goods.

In this case "Solio" is, so far as the English language is concerned, an invented word; indeed, Lindley L.J. in his judgment in the Court of Appeal says, "Nobody ever heard of it before, and in that sense it is an invented word"; but he proceeds to hold that it had some reference to the character or quality of the goods, and consequently could not be registered. I find no such restriction in clause (*d*); the restriction on the use of such words is in clause (*e*); and I cannot see how a limitation or restriction found in (*e*) can be introduced into (*d*). Therefore, given an invented word, in my opinion it is capable of registration.

I therefore concur in the judgment which has been moved.

LORD SHAND. My Lords, I am of the same opinion. The separation of the clauses in the section of the statute in question by the letters "*d*" and "*e*" and the alternative particle "or" satisfy me that the two clauses are independent and to be construed as independent provisions—so that the terms of (*e*) do not control or affect the terms of (*d*). At the same time, I agree with your Lordships, and particularly with what has been said by my noble and learned friend Lord Macnaghten, in thinking, especially after the decision to be given in this case, that the Comptroller-General will be fully warranted in taking

care that there shall not be admitted, under the guise or cover of words called "invented" by the applicant, words really in ordinary use, which might, in a disguised form, have reference to the character or quality of the goods. There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required; but the words, I think, should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word; and a word would not be "invented" which, with some trifling addition or very trifling variation, still leaves the word one which is well known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word.

D. M. Kerly having applied that the costs ordered by the Courts below to be paid by the appellants to the respondent should be repaid to the appellants,

Sir R. E. Webster A.-G. appeared on a later occasion and said that with regard to the costs in the first Court, for a great many years it had been considered that those were part of the costs of getting the registration, and when the Board of Trade had referred the matter to the Court, the Court had always said that the applicant could not get registration without that ceremony being gone through, and the Court had ordered the costs to be paid by the applicant. But with regard to the costs of the appeal which were ordered to be paid when the Court of Appeal decided against the appellants, that decision having turned out to be wrong, he quite agreed it would be wrong that the appellants should be made to pay those costs, and though there were difficulties, and he did not know that the House had jurisdiction over the matter, he would do all he could to see that those costs were returned to the appellants.

THE EARL OF HALSBURY L.C. said that while there was no power to give costs against the Crown, their Lordships were all of opinion that the costs ordered by the Court of Appeal to be

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paid by the appellants to the respondent should be returned to the appellants. The costs before Kekewich J. were another matter.

Order of the Court of Appeal reversed: Cause remitted to the Chancery Division.

Lords' Journals, July 15, 1898.

Solicitors for appellants: *Bird, Moore & Strode.*
Solicitor for respondent: *Solicitor, Board of Trade.*

[HOUSE OF LORDS.]

H. L. (E.) 1898 *July* 19.

THE INCORPORATION OF THE GUARDIANS OF THE POOR OF PLYMOUTH . . . . . } APPELLANTS;

AND

THE GUARDIANS OF THE POOR OF THE AXMINSTER UNION . . . } RESPONDENTS.

Poor Law—Settlement—Illegitimate Pauper—Birthplace—Derivative Settlement of Parent—Divided Parishes Act, 1876 (c. 61) *s.* 35.

On inquiry as to the place of settlement of an illegitimate pauper, it was proved that the pauper was born in P. and the pauper's mother in S., and that neither of them had acquired a settlement of her own. Facts were proved upon which the Court held that the father of the pauper's mother had a settlement and that the pauper's mother derived that settlement from him, but did not make the necessary inquiries to ascertain what that settlement was, and adjudged that the pauper's settlement was in P. where she was born:—

Held, affirming the decision of the Court of Appeal, that the adjudication was right; that the case came within the 3rd paragraph of s. 35 of the Divided Parishes Act 1876, and that since it could not be shewn what settlement the pauper derived from her mother without inquiring into the derivative settlement of the mother, the pauper must be deemed to be settled in the parish where she was born.

ON an appeal to the Plymouth Borough Quarter Sessions from an order of justices of October 1895, adjudging that the last legal settlement of Matilda Small (otherwise Manley), a

pauper lunatic, was in the parish of Stockland in the respondent union, the recorder stated the following case:—

The following facts were either proved or admitted at the hearing of the said appeal:—

That the pauper lunatic was born on December 19, 1875, at Plymouth: that she had done no act to gain a settlement: that she was the daughter of Eliza Manley: that Eliza Manley was a single woman, living about in tents, and had done no act by which she had gained a settlement of her own: that Eliza Manley was born in the parish of Stockland in 1848, and was the daughter of Henry Manley and Matilda Manley, who were married at Bridport on June 7, 1847: that Henry Manley was born of English parents. His wife Matilda Manley was called as a witness, and stated that he was an Englishman, that he was carrying on the business of a sweep at Bridport with his father at the time she married him, that his father was for many years living there, and carrying on the business of a sweep, in which he employed several boys, and that she had known Henry Manley living at Bridport from his boyhood. On this evidence the recorder held (if he could rightly do so, and if it was material) that Henry Manley had a settlement, though the recorder did not make the necessary inquiries to ascertain what that settlement was, and that Henry Manley's daughter Eliza derived that settlement from him.

On these facts the recorder adjudged that the pauper was settled in the Plymouth Union, that is, in the place where she was born, in accordance with the 3rd paragraph of s. 35 of the Divided Parishes Act, 1876, as he was of opinion, on the above facts, that Eliza Manley had no original settlement of her own, and that it could not be ascertained what settlement the said pauper derived from her mother Eliza Manley without inquiring into Eliza Manley's derivative settlement.

If the Court should be of opinion that the pauper was settled in the Plymouth Union, the order to stand confirmed. But if the Court should be of opinion that the pauper was settled in the parish of Stockland, the order of sessions to be quashed, and the order of the justices to stand confirmed.

This order was affirmed by the Queen's Bench Division

H. L. (E.) 1898 PLYMOUTH UNION v. AXMINSTER UNION.

(Day and Lawrance JJ.), and that decision was affirmed by the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.). From these decisions the Plymouth guardians brought the present appeal.

1898. June 16, 17. *Macmorran Q.C.* and *Corrie Grant* for the appellants. The recorder was not justified in holding that the father of the pauper's mother had a settlement without finding what that settlement was. How could he know that the father had a settlement at all unless he knew what the settlement was? And how could he hold that the pauper's mother derived "that" settlement from her father, when he was entirely ignorant what "that" settlement was? There was no evidence that the pauper's mother derived any settlement from her father. The statute and the authorities equally present difficulties: the simplest solution of the present puzzle is to take the plain words of the 2nd paragraph of s. 35 of the Divided Parishes Act, 1876: "An illegitimate child shall retain the settlement of its mother until such child acquires another settlement," and to overrule the authorities contra. This pauper never acquired a settlement, therefore it retains the settlement of its mother, namely, the mother's birthplace: *Rex* v. *Heaton Norris, Inhabitants of.* (1) The mother's birth settlement could not be displaced without shewing that her father had a settlement which she could derive from him, and this was not shewn. Children take their parents' settlement—the father's if legitimate, and the father's birth settlement in default of others—*Liverpool Guardians* v. *Portsea Overseers* (2)—the mother's, as here, if illegitimate. See also *Woodstock Guardians* v. *St. Pancras Churchwardens* (3); *Bath Guardians* v. *Berwick-on-Tweed Guardians* (4); *Reigate Union* v. *Croydon Union* (5); *West Ham Guardians* v. *St. Giles-in-the-Fields Overseers* (6); *Reg.* v. *Marylebone Guardians.* (7) So when the child's settlement acquired from the parent could not be

(1) (1796) 6 T. R. 653.
(2) (1884) 12 Q. B. D. 303.
(3) (1878) 4 Q. B. D. 1.
(4) [1892] 1 Q. B. 731.
(5) (1889) 14 App. Cas. 465.
(6) (1890) 25 Q. B. D. 272.
(7) (1884) 13 Q. B. D. 15; 53 L. J. (M.C.) 88.

ascertained without ascertaining the parent's derivative settlement, it took its birth settlement in *Headington Guardians* v. *St. Olave's Guardians* (1), but in that case the child was legitimate, and the case has no application. But in *Hollingbourn Guardians* v. *West Ham Guardians* (2) the children took the widowed mother's settlement though it was derivative. In *Headington Guardians* v. *Ipswich Guardians* (3) there was no choice: the bastard took its birth settlement, as the mother had none—birth or derivative.

[They also cited *Reg.* v. *Watford Inhabitants* (4); *Reg.* v. *All Saints, Derby.* (5)]

Asquith Q.C. and *H. E. Duke* for the respondents. The finding of fact by the quarter sessions is conclusive. The authorities cited for the appellants so far as they are material are against the appellants. *Amersham Guardians* v. *City of London Guardians* (6) is in favour of the respondents. In the *Hollingbourn Case* (2) no inquiry as to the derivative settlement of the parent arose. *Headington Guardians* v. *Ipswich Guardians* (3) supports the respondents' contention. The object of the Act is to obviate the need of these expensive inquiries, and no evidence can be admitted which goes to prove a derivative settlement in a parent: *Reg.* v. *Bridgnorth Guardians.* (7) It does not matter what the settlement of the father of the pauper's mother was. It was proved that he was an Englishman, living in England. Therefore he must have had a settlement, and that settlement was taken by the pauper's mother at her birth. That was a derivative settlement, and the 3rd paragraph of s. 35 applies.

[They also cited *Duke of Banbury* v. *Broughton Parish* (8); *Hereford Guardians* v. *Warwick Guardians.* (9)]

Macmorran, Q.C., in reply.

The House took time for consideration.

(1) (1884) 13 Q. B. D. 293.
(2) (1881) 6 Q. B. D. 580.
(3) (1890) 25 Q. B. D. 143.
(4) (1846) 16 L. J. (M.C.) 1.
(5) (1849) 14 Q. B. 207.
(6) (1889) 20 Q. B. D. 103.
(7) (1883) 11 Q. B. D. 314.
(8) (8 Will. iii.) Comberbach, 364.
(9) (1879) 48 L. J. (M.C.) 111.

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July 19. LORD HERSCHELL (after stating the facts). My Lords, the question in controversy turns upon the construction of the 35th section of 39 & 40 Vict. c. 61. That section, after enacting that no person shall be deemed to have derived a settlement from any other, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or widowed mother up to that age, and shall retain the settlement so taken till it shall acquire another, and further, that an illegitimate child shall retain the settlement of its mother until it acquires another settlement, provides as follows: "If any child in this section mentioned shall not have acquired a settlement for itself, or, being a female, shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

It is contended for the appellants that the provision I have just quoted is inapplicable to the present case, and that the pauper is not to be deemed settled in the parish in which she was born, but in the place of the birth settlement of her mother. It was conceded that the birth settlement of the mother was only her primâ facie settlement, or, as it was put, that it would be displaced if she had a higher settlement such as one derived from her father; but it was argued that until it was shewn what the settlement of the father was, and therefore what the settlement she derived from him was, the enactment did not apply.

I concur with the Courts below in thinking that this argument is not well founded; in my opinion it would defeat the very object which the enactment had in view. This plainly was to prevent the expense which was often incurred by parishes and unions through prolonged and elaborate inquiries into derivative settlements. It was thought that it would on the whole prove more beneficial to poor law authorities to lay down the artificial rule that where an inquiry into a derivative

settlement would otherwise be involved, the place of birth of the pauper should be taken to be the place of settlement.

If in order to bring the clause into operation it is necessary to proceed with the inquiry to the extent of ascertaining what the derivative settlement is, I cannot conceive why the place so ascertained should not have been treated as the place of settlement, and why another and wholly artificial place of settlement should have been substituted for it. I think the very purpose of the enactment was to preclude any such inquiry, and the language employed seems to me conclusive against the interpretation sought to be put upon it. The words are not without "ascertaining," but without "inquiring into" the derivative settlement of such a parent.

As soon, then, as it appeared that the pauper's mother was the legitimate offspring of an English father, I think the case was brought within the enactment I am considering, and the learned recorder was right in declining to proceed with the inquiry into the settlement of the father, and in adjudging the pauper settled in the parish in which she was born.

It may well be that where nothing is known of the circumstances beyond the birth settlement of the pauper's parent, this is to be adjudged the place of the child's settlement; but that is a different case from the one with which your Lordships have now to deal. Although there may be dicta in some of the authorities cited not altogether consistent with the conclusion at which I have arrived, I do not think it conflicts with any decision. I therefore move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, it seems to me that the learned recorder was right.

I see no reason to alter or modify the opinion I expressed, perhaps unnecessarily, in the *Reigate Union Case.* (1)

It appears to me that when there is an independent inquiry into the settlement of a child, the Act of 1876 tells you plainly that if you find that the settlement of the parent of the child was a derivative settlement you are not to pursue the inquiry

(1) 14 App. Cas. 465.

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any further: the child is to be deemed to be settled in the place of its birth. The Act prohibits all derivative settlements except in two specified cases. It could hardly have meant that in a case not falling within either of those exceptions the expense of an inquiry into a derivative settlement was to be incurred for the purpose of arriving at a conclusion which must be set aside as soon as it is reached. What the Act means, I think, is this: You must open the door wide enough to see where the path beyond is leading to. If you find that it leads in the forbidden direction, you are to shut the door at once and apply the rule prescribed by the Act.

I agree in the motion proposed.

LORDS MORRIS and SHAND concurred.

EARL OF HALSBURY L.C. My Lords, I concur in the judgment proposed, and have nothing to add.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 19, 1898.

Solicitors for appellants: *Crowders & Vizard, for William Adams, Plymouth.*

Solicitors for respondents: *Geare, Son & Pease, for William Forward, Axminster.*

[HOUSE OF LORDS.]

SAILING SHIP "BLAIRMORE" COMPANY, LIMITED, AND OTHERS . . . } APPELLANTS;

AND

MACREDIE . . . . . RESPONDENT.

H. L. (Sc.) 1898 July 11.

Insurance (Marine)—Valued Policy—Constructive total Loss.

Where a ship has been sunk in deep water, the underwriters cannot escape liability as for a total constructive loss by gratuitously intervening and taking upon themselves, between the date of notice of abandonment and the time when legal proceedings are commenced under the policy, the expenses of raising the insured vessel and saving her from being a constructive total loss. And such a gratuitous expenditure will not relieve the underwriters from their contractual liability.

The test whether a ship has become a constructive total loss is the same in English as in Scottish law, although these laws may differ in regard to the date at which the test ought to be applied. In considering whether a constructive total loss has occurred, the question is whether a shipowner of ordinary prudence and uninsured would have gone to the expense of raising a sunken ship and repairing her.

A ship insured under a valued policy was struck by a squall and sunk in harbour. The underwriters received notice of abandonment from the insured; but before action brought they, by a large expenditure of their own, raised the ship and claimed that, as the ship could at the date of the action have been repaired by the expenditure of less money than her total value, the loss was not a total but a partial one:—

Held, reversing the decision of the Second Division of the Court of Session, that the underwriters could not change a constructive total loss into a partial loss by intervening and raising the ship at their own expense.

APPEAL from the Second Division of the Court of Session (Scotland). (1)

The action was brought on a policy of marine insurance effected at Glasgow on the vessel *Blairmore*, belonging to the appellants, the Sailing Ship "Blairmore" Company, to recover from the respondent, John Macredie, Glasgow, one of the underwriters, upon the ground that the ship was a constructive total loss, for his share of the liability for the insured value of

(1) 24 R. 893.

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the ship. The action was a test action. The policy, which was dated April 7, 1896, was a time policy for a period of two months commencing on April 3, 1896, and with four other policies covered the ship valued at 15,000*l.* in port at San Francisco Bay and tributaries. The object was to insure the ship while laid up in the bay awaiting employment; and one of the questions in the action was whether the ship, with the knowledge of the appellants, arrived there in an unseaworthy state on account of not having sufficient ballast on board, nor a sufficient crew; but this question and other minor questions did not arise in this appeal.

The facts are fully given in Lord Watson's opinion.

Feb. 15, 17. *Robson, Q.C.*, and *Salvesen* (of the Scottish Bar), (with them, *Malcolm Macnaghten*), for the appellants. The decision of the Court of Session was erroneous. The underwriters did not accept the notice of abandonment. The point for decision in this appeal is whether the expenses incurred by the underwriters in raising the vessel are to be ignored; and this question is well raised on the pleadings. The Court of Session considered themselves bound by the alleged English Admiralty Court rule that the right to recover as for a constructive total loss depends entirely upon the state of the facts at the date when the action is brought on the policy. And it is quite true that English marine insurers take that as the law, and have adopted the practice of giving warning with the notice of abandonment that the notice must be taken to be of the same effect as the issue of a writ. The origin of the English rule arose out of capture and recapture: *Hamilton* v. *Mendes*. (1) But the First Division of the Court of Session in *Robertson, Forsyth & Co.* v. *Stewart, Smith and Others* (2) held that the circumstances at the date of the notice of abandonment decided whether there had been a total loss or not, and that decision has not been questioned until this case, the appeal of that case to this House (3) being affirmed on the special ground that the underwriters had accepted the notice of abandonment. The English cases of

(1) (1761) 2 Burr. 1199, 1208–9. (2) (10 Feb. 1809) 15 F. C. 165.
(3) (1814) 2 Dow, 474.

Bainbridge v. *Neilson* (1) and *Falkner* v. *Ritchie* (2) were referred to in *Robertson's Case* (3) by Lord Eldon as deciding that the question depended upon the circumstances at the date of action brought; but his Lordship apparently thought that the English rule was open to revision, and an idea was entertained of summoning the English judges; but after consideration the appeal was dismissed on the above ground. Then followed the English cases of *Patterson* v. *Ritchie* (4); *M'Iver* v. *Henderson* (5); *Brotherston* v. *Barber* (6); *Cologan* v. *London Assurance Co.* (7); *Holdsworth* v. *Wise.* (8) In *Shepherd* v. *Henderson* (9), a case decided on facts found by the Court of Session, Lord Blackburn referred to the subject. The appellants contend that *Robertson's Case* (3) settled that by the law of Scotland a notice of abandonment fixes the circumstances at that date; and this ruling is in accordance with the rule followed in all leading maritime States. There is no good reason why the rule established in England should now be introduced into Scotland. The substantial question is whether the cost to be expended in raising the vessel is to be taken into account in considering whether there has been a constructive total loss.

[LORD WATSON mentioned *Cossman* v. *West.* (10)]

See also *Stringer* v. *English and Scottish Marine Insurance* (11), that even if possession might possibly be resumed by the owner that will not reduce what has been a total loss to a partial loss.

But lastly, assuming the law of England and Scotland to be the same, here, for the decision of this appeal, it does not matter what period is looked at. The subsequent knowledge of the appellants and events shew that the insured were right in giving notice of abandonment. The underwriters spent 7600*l.* in righting the vessel, and that coupled with the estimated cost of repairs exceed 15,000*l.*, the value of the ship.

(1) (1808) 10 East, 329.
(2) (1814) 2 M. & S. 290.
(3) 15 F. C. 165; 2 Dow. 474.
(4) (1815) 4 M. & S. 393.
(5) (1816) 4 M. & S. 576.
(6) (1816) 5 M. & S. 418.
(7) (1816) 5 M. & S. 447.
(8) (1828) 7 B. & C. 794.
(9) (1881) 7 App. Cas. 49, 69, 71.
(10) (1887) 13 App. Cas. 160.
(11) (1869–70) L. R. 4 Q. B. 676; 5 Q. B. 599.

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In the respondent's statement of facts (viii.) he maintains that in estimating "whether or not the ship was a constructive total loss the owners were not entitled to include in the cost of repairs the expenditure by the underwriters themselves for the preservation of the property, which expenditure the owners were not bound to reimburse." He then goes on to state that the cost of righting the ship could only be reckoned at 4500*l.*, and that the fair value of the vessel repaired would be 15,300*l.* The question was argued before the Court of Session whether the underwriters could make the owners a present of the 7600*l.*; but their judgment took no notice of this question, deciding that, as the vessel was raised before action brought and the cost of repairs did not exceed the value, there was no relevant case to shew a constructive total loss. But the whole cost appertaining to the recovery of the ship must be added together, and, doing that, it is clear there was an actual total loss. Whatever may be the effect of a change of circumstances produced by natural or neutral operations, the underwriters cannot be allowed to effect any such change of circumstances with the view of evading their liability under their own contract.

Joseph Walton, *Q.C.*, and *Aitken* (of the Scottish Bar), for the respondent. The question is whether the English rule ought to prevail in Scotland: and the one question now for decision is whether the 7600*l.* is to be taken into account, bearing in view the fact that the ship was raised before action brought. As appears from the allegations, the ship went to the bottom; but that fact alone has never been held to constitute a constructive total loss: *Kemp* v. *Halliday*. (1) Take the case of a ship not damaged at all: what is there to prevent the underwriters from raising and restoring her? Suppose the case of a ship sunk undamaged and drifting in-shore undamaged, or a ship captured—in each case the owner is deprived of possession. What is there to prevent the underwriters spending their money to restore her?

[LORD HERSCHELL. Because it is an attempt to upset their own contract.

(1) (1866) L. R. 1 Q. B. 520.

LORD JAMES OF HEREFORD. Take the case of an owner before the restoration of his vessel purchasing another ship at a huge cost, say also before action brought?]

Every prudent shipowner when he gives his notice of abandonment says, "This is to be taken as the writ." But the appellants have not done this. The assured does not recover because the ship is repaired. It may be repaired for a few pounds. Constructive total loss arises when the cost of repairs exceeds the value of the ship. It makes no difference whether the act which restores the ship is the act of man or an act of the elements. Why should not the underwriters spend their money? If the assured gets the ship back at no cost to him before action brought, how can he then say that there has been a total loss? Suppose some one for his own purpose spends a large sum of money in raising the ship, and presents it to the owner?

[LORD HERSCHELL. The owner's answer would be that he was not going to have anything to do with it.

LORD WATSON. The question is whether the device of the underwriters is legitimate or not.]

Robson, Q.C., in reply.

The House took time for consideration.

July 11. EARL OF HALSBURY L.C. In *Milles* v. *Fletcher* (1) Lord Mansfield said that the great object in every branch of the law, but especially in mercantile law, is certainty, and that the grounds of decision should be certainly known.

In this case a controversy has been raised which I had thought had long since been laid to rest.

During the existence of a time policy, a ship covered by it has been struck by a squall and sunk, and it is contended that if the underwriters can raise her up again by an expenditure of their own, and that then when she is raised she can be repaired by the expenditure of less money than her total value, when thus raised they are only to be liable as for a partial loss.

It seems to me that such a proposition would unsettle the

(1) (1779) 1 Doug. 231 a.

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law as between insurers and insured as it has been understood and acted upon for something like a century.

I myself should say a ship was totally lost when she goes to the bottom of the sea, though modern mechanical skill may bring her up again; and I think, in construing a contract now for many years a common contract, no one could doubt that that contract was intended by the parties to contemplate the loss of a ship as comprehending the case of her being sunk.

It is, I think, a total misapplication of what has been found to be a convenient test to distinguish a total from a partial loss to apply it to a case where the vessel insured has gone to the bottom. The question is, What did the contract between the parties mean?

No such case has arisen before: inasmuch as I think so bold a contention has never been made. The cases of capture and recapture have sometimes given rise to somewhat difficult questions of fact rather than law, and I think their application to cases of loss by perils of the sea has occasionally given rise to confusion; but even in such cases it has always been held that the principle is that the existence of the thing in esse is not conclusive against the loss being a total loss; and I think that now, after all the discussion that these questions have received, both insurer and insured must be taken to have understood the words "total loss" in the business sense of those words.

I am disposed here to adopt the language of Erle C.J. in *Adams* v. *Mackenzie* (1), where a ship was insured in the peculiar form of "against total loss only." The learned judge says: "It has been urged on the part of the underwriters that they only intended to become answerable for one of two descriptions of 'total loss,' namely, the actual total destruction of the subject-matter of insurance, and not for that which all persons conversant with insurance business understand as being a total loss. All I can say is, if they so intended they have failed to express their intention." And Williams J., with whom Willes J. concurred, says: "If the parties intended only to insure against the total and absolute physical destruction of the ship, they should have expressed themselves in different language."

(1) (1863) 13 C. B. (N.S.) 446.

My view is that, in the contemplation of both parties to this contract, a total loss is incurred when the ship goes to the bottom: see *Irving* v. *Manning*. (1)

In this particular case, for the reasons I have given, the familiar test which brings a constructive total loss into a partial loss, I think, is not applicable at all; but if it were, the formula would have to be altered. It would no longer be, what would a prudent uninsured owner do? but, how much would an astute underwriter expend to turn a total into a partial loss?

The change of circumstances which in our jurisprudence has been held to turn a total into a partial loss has arisen, certainly originally if not altogether, in respect of insurances against capture, where to my mind totally different considerations arise. A vessel by being captured is certainly lost to its owner; but, as in one case where the question arose, a vessel may be taken and retaken before any one knows of the loss, and as the contract of insurance is mainly a contract of indemnity, one can see how the Courts would struggle against a large profit being made out of such a contract. But where the laws of other countries differ from ours in this respect, I think it will be found that the difference arose from positive enactments and regulations, apparently directed to avoid the solution of difficult and complicated questions of fact.

The Scottish judges have held apparently that the law of Scotland is the same as the law of England, and, as in mercantile and maritime law, unlike in this respect to some other parts of Scottish jurisprudence, the sources of the laws of both England and Scotland are the same, I am glad to think, in this respect, the learned judges are right. It would be very inconvenient if, in such questions as arise in this case, the law were different.

My Lords, I think the judgment should be reversed, with the usual consequences as to costs.

LORD WATSON. The sailing ship *Blairmore* was, in the beginning of April, 1896, at San Francisco awaiting employment. The appellants, her managing owners, had, on April 7,

(1) (1847) 1 H. L. C. 287.

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insured her against total loss, valued at 15,000*l.*, under a time policy for two calendar months in port at San Francisco, and for San Francisco Bay and for its tributaries, commencing at midnight on April 3, 1896.

On April 9, 1896, the *Blairmore*, whilst moored in the bay of San Francisco, was struck by a squall and sunk. An offer was made by salvors at San Francisco to raise the vessel for 5760*l.*, which was not accepted. On April 15, 1896, the appellants gave notice of abandonment to the underwriters, including the respondent, Mr. Macredie.

The underwriters on April 10, 1896, sent Captain Burns, an officer of the Glasgow Salvage Association, to San Francisco; and when the offer for 5760*l.* was communicated to them, they replied that they would prefer lifting operations to be delayed until his arrival, if the delay were not prejudicial. After his arrival, Captain Burns, acting on behalf of the underwriters, proceeded to raise the vessel, which he at length succeeded in doing on July 16, 1896, at a total cost to his employers of about 7600*l.*, which was paid by them before the present action was raised.

The action was brought by the appellants in the beginning of December, 1896, against the respondent for recovery of his proportion of the total sum insured. The facts which I have already stated are substantially admitted on the record. In their condescendence the appellants state that the cost of raising and repairing the ship would be about 15,000*l.*, and that her value after being raised and repaired would be about 9600*l.* The respondent, in his separate statement of facts, avers that, owing to the failure of the appellants or of those for whom they are responsible, to take certain necessary precautions, which he specifies, the *Blairmore* was not on April 9 in a seaworthy condition, and that the disaster which befell her was due to that cause. He avers that, in estimating whether the vessel was a total constructive loss, the appellants are "not entitled to include in the cost of repairs the expenditure by the underwriters themselves for the preservation of the property, which expenditure the owners were not bound to reimburse. Further, even if the cost of lifting the vessel had to be reckoned as part of the cost of repairs, it could only be taken at 4500*l.*, which, in ordinary circumstances, would have been sufficient to

meet the cost of raising the vessel." He also averred that the fair value of the vessel at San Francisco when repaired was 15,300*l.* Upon the record, the parties are directly at issue as to the truth of the statements respectively made by them which I have last noticed.

The respondent's first plea was to the effect that "the pursuer's averments are irrelevant." The Lord Ordinary (Kyllachy), at the desire of the parties, and before any inquiry as to the disputed facts, heard them upon the question of relevancy. On February 18, 1897, he found that the appellants' statements were "irrelevant as founding a claim under the policy in question as for a total loss"; and he therefore sustained the plea, and dismissed the action. His interlocutor was, on June 4, 1897, affirmed by the Second Division of the Court, consisting of Lords Young, Trayner, and Moncreiff. In giving judgment, the Lord Ordinary pointed out that the record was not "in the best shape for a judgment upon relevancy"; and, in my opinion, it would have been a much more expedient course to have allowed the parties a proof in regard to the facts as to which they were not agreed, and to have reserved the preliminary plea for discussion along with the merits of the case.

The plea directed against the relevancy of the action, as it was maintained in both Courts below and at the bar of the House, turned mainly upon the question, which is one of law and not of fact, whether the appellants, in calculating the total loss for which they claimed, were entitled to take into account either the costs of raising and righting the vessel, which had actually been paid by the underwriters, or an estimate of the expense which would have attended that operation if the underwriters had not intervened. The respondent argued that neither of these factors ought to be taken into calculation, and that, in that aspect of the case, the appellants' averments shewed a partial and not a total loss; that these averments disclosed that the raising of the vessel had been completed some months before the date of the action, leaving no loss to be borne by the insured beyond the cost of repairing her; and that the fact of her having been raised by the underwriters at

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their own expense placed the insured in the same position as if the raising had been effected by natural causes, such as volcanic action under the bed of the sea, or by some neutral person acting in furtherance of his own purposes. The appellants made two answers to that contention. They maintained, in the first place, that by the law of Scotland the liability of the underwriters depends upon the state of circumstances existing at the date when notice of abandonment is given—in this case on April 15, 1897—and that subsequent occurrences, such as the raising of the vessel, between that time and the date of the action cannot be considered, unless at the date of notice they were matters of such certainty or of such probability that a prudent uninsured shipowner would have relied upon them. In the second place, they maintained that, assuming the law of Scotland to be the same with that of England, both as to the time at which and the manner in which a total constructive loss ought to be ascertained, whatever might be the effect of a change of circumstances produced, subsequent to the notice of abandonment, by natural causes or neutral operations, the underwriters cannot legally effect any such alterations at their own hand, either with the view or with the result of evading their liability under the contract of insurance.

It is obvious that the success of the respondent's plea must depend upon the view which your Lordships may take of the two propositions which are advanced by the appellants in reply to it. If either of them be affirmed, the plea must necessarily fail. Both propositions are discussed and rejected by the Lord Ordinary in the opinion which he delivered, and were stated by counsel for the appellant, without contradiction, to have been pleaded in the Inner House. The report of the case (1) bears out that statement; but it is the fact that, in the judgments which they delivered, the learned judges of the Division deal exclusively with the first of them, and take no notice whatever of the second. I regret that omission, because, in the view which I take, the legal question raised by the second proposition is the only one which it is necessary to consider and determine for the purposes of this appeal.

(1) 24 R. 898.

In the admitted circumstances of this case, I do not think it is matter of necessary inference that the *Blairmore*, when she went to the bottom of the sea on April 9, 1896, became immediately an actual total loss. She did not become, in the strict sense of the term, a total wreck, seeing that she was not reduced to the condition of a mere congeries of wooden planks or of pieces of iron which could not without reconstruction be restored to the form of a ship, and that she had sunk in a depth of water which admitted of her being raised to the surface and repaired. But the vessel might, nevertheless, in these circumstances be a constructive total loss; and, in my opinion, the proper test for ascertaining whether she had become so or not is the same in Scottish as in English law, although these laws may differ in regard to the date at which the test ought to be applied. The test, as I understand it, is simply this: that in order to instruct a total constructive loss, at the date to which the inquiry relates, it must be shewn that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, but would have left her at the bottom of the sea, because her market value when raised and repaired would probably be less than the cost of restoration and repair. That, in my opinion, was the test as explained by the consulted judges and accepted by this House in *Irving* v. *Manning*. (1)

The only judicial authority to be found in the law of Scotland upon the first point taken by the appellants is *Robertson, Forsyth & Co.* v. *Stewart, Smith and Others* (2), in which the First Division affirmed a decree made by the Admiralty Court against underwriters on the footing that there had been a total loss of the vessel insured. The ship, which was insured at Glasgow and Greenock, was captured by a Spanish privateer on September 16, and on October 19 her owner gave notice of abandonment to the authorities, and requested a settlement. On October 24 the Glasgow underwriters "agreed to settle on the footing proposed," and the Greenock underwriters had previously, on the 21st of that month, "declared themselves satisfied"; but they subsequently resisted the shipowner's

(1) 1 H. L. C. 287. (2) (Feb. 10, 1809) 15 F. C. 165.

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action for recovery as for a total loss on the ground that the vessel had been recaptured on October 25, and taken into Guernsey. In their defence they offered to pay salvage and other loss which had arisen from the capture. The opinions delivered by the learned judges of the Court of Session are not given, but the substance of them is stated by the reporter, from which it appears that the principal, if not the only, ground of decision was—"that, on the news of the capture of the vessel, the owners were entitled to abandon, and that, after the capture, intimation of the abandonment had been duly and regularly made. That it was necessary to draw a line when this transfer of ownership should be complete and definitively made. That there was no line more proper, more suitable to the strict terms of the contract of insurance, more consistent with justice and expedience, than that where a fair and full exercise of the right of abandonment had been made, upon a view of a total loss, at the time against which the policy provided the right of the insured to recover for that loss, should be complete; and that the insurer should not be permitted to undo the transaction merely because subsequently emerging circumstances may have been made more agreeable to his interest." (1)

The underwriters appealed to this House (2), where they maintained that the Court below had proceeded upon a misapprehension of the law of Scotland, and that they ought to have decided the case in conformity with the principles followed by the Court of King's Bench in *Bainbridge* v. *Neilson* (3) and in *Falkner* v. *Ritchie*. (4) At the end of the argument the Lord Chancellor (Eldon), with whom Lord Redesdale sat, criticised, not altogether favourably, the decisions of the King's Bench, and, observing that "the decision on this question of mercantile law ought in both countries to be the same" (5), intimated that, inasmuch as, in deciding the case, their Lordships might affect the decisions of their own Courts, it was proper that the case should be argued in the presence of the

(1) 15 F. C. 165.
(2) 2 Dow, 474.
(3) 10 East, 329.
(4) 2 M. & S. 290.
(5) 2 Dow, 480.

judges. The judges were never summoned to attend the House, because, on consideration, the noble and learned Lords affirmed the judgment of the Court of Session upon the express ground that the underwriters, by their acceptance of the notice of abandonment as for a total loss, were precluded from disputing their liability.

The question of Scottish law, which was brought before but was not decided by this House in *Robertson, Forsyth & Co.* v. *Stewart, Smith and Others* (1), is, in my opinion, as open now as it was in the year 1814. Since that date more than eighty years have elapsed. During that period the English decisions which were criticised by Lord Eldon have been consistently followed in English Courts; and, to my apprehension, it would be beyond the function of this House to alter them now, as might have been done in the beginning of the century. In Scotland, during the same period, there has not been a single decision upon the point save in the present case. I agree with the learned judges of the Court below in thinking that one decision of the First Division in 1809, upon a ground which was not affirmed on appeal, cannot be regarded as so settled an authority in the law of Scotland that it can neither be revised nor altered by the Court of Session or by the House of Lords.

It appears to have been held by the learned judges in both Courts below that, there being no firmly established rule upon the point in Scotland, the decision of it ought to be in conformity with the law of England. One of the learned judges observed: "It has been stated recently, on high authority, that the law upon maritime questions is the same in Scotland as in England, and if this view so broadly stated, is adopted, then we have nothing to do in this case beyond applying to it the rule which, I have said, is now settled in England. As matter of individual opinion I do not concur in that view." I do not think I am mistaken in supposing that the preceding passage refers to the recent decision of this House in *Currie* v. *M'Knight*. (2) All that was determined in that case was that in maritime causes which exclusively belonged to the jurisdiction of the Admiralty Courts in both countries the law applicable

(1) 15 F. C. 165; 2 Dow, 474. (2) [1897] A. C. 97.

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was neither English nor Scottish, but British law, and therefore one and the same code. But the jurisdiction exercised by these Courts in the two countries has never, so far as I am aware, been precisely coextensive. In Scotland, the Admiral's jurisdiction, although cumulative with that of the Court of Session, extended to all questions arising in regard to policies of maritime insurance, and had also been extended "by long possession" to the right of cognizance in bills of exchange and other mercantile questions which were in no sense maritime (Ersk. Inst. B. 1, Tit. III., ss. 33 and 34). In England, on the other hand, policies of marine insurance were regarded simply as matters of mercantile contract, and actions brought upon them belonged to the jurisdiction, not of the Admiralty, but of the Common Law Courts. Accordingly, I do not think that *Currie* v. *M'Knight* (1) has any application to the first point raised by the appellants in answer to the respondent's plea of irrelevancy, and I see no reason to differ from the observations made by Lord Blackburn in the Scottish case of *Shepherd* v. *Henderson* (2), to which Lord Trayner refers with approval. These observations appear to me to be characterised by the usual accuracy of the noble and learned Lord. I may observe, however, that the findings of fact contained in the interlocutor appealed from, which in that case were binding upon the House, were not calculated to raise the question discussed in those observations by the noble and learned Lord, one of them being to the effect that, on the day the vessel was driven ashore, there was and continued thereafter to be a reasonable prospect of her being got off without greater expense than a prudent uninsured owner would reasonably incur. In either view of the law, that finding was sufficient to negative the claim made for a constructive total loss.

I should have been unwilling to decide the first point without hearing an argument going beyond Scottish and English cases, and embracing the rationes which have governed the practice and decisions of other countries which have not adopted the English rule; but I am relieved from the necessity of considering and deciding it, having come to the conclusion

(1) [1897] A. C. 97. (2) 7 App. Cas. 71.

that the second point advanced by the appellants is well founded in law.

In considering the second, I shall assume that the first point was rightly decided by the Courts below; and also that if the *Blairmore* had been raised after notice of abandonment, and before the date of the action, by the operation of natural causes, or by the action of neutral persons, without expense to the insured, the appellants would according to English law have been disabled from claiming under their policy for a total constructive loss, if it were shewn that the value of the ship when repaired would have substantially exceeded the cost of repairing her. But the question still remains whether the gratuitous act of the underwriters in raising the vessel at their own expense, leaving nothing but the cost of repairs to be borne by the insured, will have the effect of reducing a total to a partial loss, and of relieving the underwriters from their contract liability. It might be that in every case where the ship has been raised by causes which entail no liability upon himself, a prudent uninsured owner would repair the vessel; but I have been unable to arrive at the conclusion that, in the circumstances which occur in this case, the consideration of what would be the action of a prudent owner uninsured, in such circumstances, affords the true test of the liability of the underwriters as for a total constructive loss. In my opinion, that test is excluded, in this case, by the contractual relations which exist between the insured and his insurers.

Not one of the English authorities, so far as I understand them, goes near to the length of deciding that the insurers can avoid their liability as for a total constructive loss by their intervening gratuitously and taking upon themselves part of the expenses which primâ facie fall upon the assured, and would otherwise have been taken into account in estimating whether there has been such a total loss. To admit an exception of that kind would be contrary to general law; and it is not, in my opinion, recommended by any principle of equity. The rule of law applicable to contracts is that neither of the parties can by his own act or default defeat the obligations which he has undertaken to fulfil. The result of admitting the

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exception in this case would be that the underwriters who would otherwise be bound to pay to the appellant the sum of 15,000*l.* would escape from that obligation by making an expenditure of 8000*l.*, which the contract did not oblige them to make or contemplate that they should make. It was strongly argued for the respondent that if the exception were admitted the appellants would be indemnified, and that the contract being one of indemnity their claims under it would be fully satisfied. The conclusive answer to that argument is, in my opinion, to be found in the circumstance that the indemnity which he proposes to give to the appellants is not that which they contracted to get. The underwriters had no larger right and were under no greater obligation to raise the ship than to pay for her repairs; and on principle, if the exception were admitted, I do not see why they should not also have been permitted to avoid their responsibility for total loss by paying the repairing shipwright's bill, or by sending the assured a cheque for its amount.

For these reasons I am of opinion that the interlocutors appealed from ought to be reversed and the respondent's plea against the relevancy of the action repelled. I do not think that in the present shape of the record your Lordships are in a position to dispose of the action upon its merits. There must be a remit to the Second Division to give final judgment, after the disputed facts have been ascertained either by proof or by mutual admission. I think the appellants ought to have their expenses in the Court of Session after the date of closing the record, and their costs of this appeal.

LORD HERSCHELL. In this case the Lord Ordinary held that the pursuers' statements were irrelevant as founding a claim under the policy for a total loss, and therefore dismissed the action. To this interlocutor the Second Division adhered. The averments in the first three articles of the condescendence disclose the following facts: The *Blairmore* was insured by time policies for the period from April 3 to June 3, 1896, for 15,000*l.* During this period she was struck by a squall and sunk. The pursuers, having ascertained that the ship could

not be raised and repaired except at a cost greatly exceeding her value when raised and repaired, gave notice of abandonment, which, however, the underwriters did not accept. Then follows this averment: "The cost of raising and repairing said ship would be about 15,000*l.*, and her value after being raised and repaired would be about 9600*l.* The pursuers believe and aver that the underwriters actually expended a sum of 8000*l.* or thereby in raising the vessel and bringing her into a place of safety."

It is contended that these averments shew that, although the notice of abandonment was properly given, there being at that time a constructive total loss, yet they also shew that at the time the action was brought the loss was not total, because if the cost of repairing the vessel, which was all that then had to be done by the assured, be alone regarded, it would be less than the value of the vessel when repaired.

According to the laws of some foreign countries, whenever a notice of abandonment has been properly given, the rights of the parties to the contract of insurance are regarded as fixed, and are unaffected by anything which may happen between that date and the time when legal proceedings are commenced. In England a long course of decisions has established a different rule, notwithstanding the unfavourable criticism by Lord Eldon of some of the earlier ones. The decisions referred to have been nearly all pronounced in cases of loss by capture where the ship having been recaptured and being in good safety at the time when the action was brought, it was held that the loss was not total. In *Holdsworth* v. *Wise* (1), however, a ship in a leaky state having been deserted at sea by her crew, acting bonâ fide for the preservation of their lives, was on the following day taken possession of by the crew of another vessel, who succeeded in bringing her into port, where she was repaired and afterwards sent to this country, but subject to claims for salvage equal to or exceeding her value. Bayley J. said: "The mere existence of a ship after a total loss and abandonment will not reduce it to a case of partial loss. The ship must be in esse in this kingdom under such circumstances that the assured may,

(1) 7 B. & C. 794.

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if they please, have possession and may reasonably be expected to take it." This was adopted as the test by Lord Campbell C.J. in delivering the judgment of the Court of Queen's Bench in *Lozano* v. *Janson*. (1) In both these cases, however, the loss was held to be total and not partial.

I take it, then, that the general rule applicable is, according to the law of this country, that if in the interval between the notice of abandonment and the time when legal proceedings are commenced there has been a change of circumstances reducing the loss from a total to a partial one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss.

The question is whether a constructive total loss can be reduced to a partial loss by the expenditure on the part of the underwriters of so much of the cost necessary to enable the vessel again to take the sea as to leave what still needs to be expended for the purpose of putting the vessel into that condition less in amount than the value of the vessel when so repaired. In the present case the insurance is against partial as well as total loss; but the question must, I think, be answered in the same way whether the policy covers total loss only, or partial loss also. Could the underwriter of a policy against total loss escape liability, although there had been a constructive total loss, by doing part of the repairs? I cannot think so. A constructive total loss is as much a total loss within the meaning of a policy of insurance as an actual total loss. And in the case of a total loss by perils insured against, whether constructive or actual, the underwriter has agreed to pay the sum insured. Where such a liability has accrued the underwriter cannot, in my opinion, incur part of the expenditure required to make the ship fit to take the sea, and then insist that the loss has become a partial one only. The rule adopted in this country with reference to a change of circumstances between the time of notice of abandonment and the time when the action is brought has never been applied to a change such as I have referred to brought about by the underwriter. And I am

(1) (1859) 2 E. & E. 160.

not disposed to extend it to a case of this description. I think it would be unreasonable, and would not give due effect to the contract between the parties.

Although the Lord Ordinary dealt with the point I have been considering, it seems to have passed unnoticed in the Inner House, where it was apparently assumed that, if the law of Scotland was the same as that of England, the judgment must be adverse to the pursuers. The argument appears mainly to have turned on the question whether the rule established in this country is the law of Scotland also. I think it right to say that, in my opinion, this question is quite open to discussion. It is certainly not concluded in a sense adverse to the pursuers' contention by any authority in the Scottish Courts; and in view of the fact that the English rule does not prevail generally in maritime countries, the reasons on which it is founded and its reasonableness will have to be considered if the question what is the law in Scotland should ever arise for decision. In the present case it is unnecessary to decide it because, in my opinion, even if the law of Scotland be identical with that of England, the argument of the appellants must prevail.

For the reasons I have given, I agree in thinking that the judgment should be reversed.

LORD SHAND. In the decision of this case, in which there has been no inquiry and no evidence adduced, the pursuers' statements must be accepted as true. The action has been dismissed on the ground of irrelevancy—that is, that assuming the truth of the pursuers' averments, it does not follow that in law they are entitled to recover as for a total loss of their ship the *Blairmore*.

It is clear that the pursuers have, in effect, averred that when the vessel went to the bottom no prudent uninsured owner would have thought of proceeding to incur the expense of raising and repairing her. The cost of doing so would have been 15,000*l*., while the vessel when raised and repaired would have been worth 9600*l*. only. In other words, an uninsured owner who was so imprudent as to proceed to raise and repair

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the vessel so as to restore her to her former condition would have simply thrown away 5400*l*. When, therefore, the notice of abandonment was given on April 15, 1896, there was a constructive total loss, and if the appellants had accompanied their notice by the institution at the same time of an action, there could have been no defence. The appellants would at once have obtained decree as for a total loss, unless, indeed, the respondents could have shewn that the loss of the vessel was not caused by a peril covered by the policy. I say there was a constructive total loss because I understand the law to be that the test of whether a constructive total loss has or has not occurred is to be found in the answer to be given to the question what would a prudent owner do if not insured. If such an owner, having regard to all the circumstances, would abandon his vessel and would not attempt to raise and repair her because the cost of doing so would exceed her value when thus restored to her former condition, a constructive total loss has been incurred. Cases in which a prudent owner would certainly proceed to raise and repair his ship, as, for example, where it appears that at a cost, say, of 2000*l*., a vessel worth 10,000*l*. or 5000*l*. could be recovered and fitted up so as to be substantially as good as before she sank, would not, according to the test I have stated, be regarded as a total loss actual or constructive; but your Lordships have no such case for consideration here.

In the present case, although on April 15, 1896, when the notice of abandonment was given, a constructive total loss had occurred, this action was not raised till December 1 of that year. In the meantime, on April 26, the underwriters succeeded in raising the vessel at a cost according to the respondent's statement of 7600*l*., but which, according to the appellants' statement, was greater. The question for decision is, What is the effect of this change of circumstances? The underwriters say to the shipowners, "Your ship is now restored to you in such a condition that, after paying for her repair, she will be of much more value in her repaired and restored condition than the cost of the repairs; and whatever may be said as to a constructive total loss having occurred in April, you

must accept the vessel now because, in consequence of our successful operations in raising the ship, there was no such loss in December, when you instituted your action, or indeed after April 26, when the ship was raised."

To this contention two answers were made by the appellants, the first of these being that, according to the law of Scotland, the date of determining whether a total loss has or has not occurred is the date of the notice of abandonment, and not the date of action raised; and, secondly, that, even if this latter date be taken, the underwriters cannot successfully maintain that the case is no longer one of total loss, because by their operations and the expense incurred by them they have in the meantime become able to restore the vessel in a state requiring only repairs of less cost than the value of the ship will be when repaired to render her seaworthy as before.

On the first of these points I think it is an open question, according to the law of Scotland, whether the law will regard circumstances intervening between a notice of abandonment and action raised as capable of altering or converting a total loss into a partial loss only. The account of the decisions as given by my noble and learned friend Lord Watson, and also by Lord Moncreiff in the Court of Session, and particularly the account of what took place in the case of Robertson, Forsyth and Co., shews, I think, that there is room for the argument that the law of Scotland is rather in accordance with that of France and America than with the rule or law which receives effect in England. The House was informed by counsel that it is not now uncommon for the shipowner by himself or his agent when a notice of abandonment is given to require the underwriters to hold the notice as equivalent to action brought. Should this practice become universal the question may probably not arise again, even in a Scottish case. Should the question, however, again occur and require to be decided, it seems to me that, desirable though it no doubt is that in mercantile matters the law of the whole United Kingdom should be the same, yet the considerations referred to by my noble and learned friends, Lord Herschell and Lord Watson, should have weight, and that the reasons on which the different

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rules adopted in maritime countries are rested should be fully examined and considered so as to attain the most just result. This may ultimately result in legislation, should the present rule in England not be found to be most in accordance with sound principle.

But again, as occurred in the case of Robertson, Forsyth & Co., I have come to the conclusion that it is not necessary here to decide what is the law of Scotland on the matter; for I concur with your Lordships in holding that the underwriters, by raising the vessel and offering her in her damaged condition to her owners, were not entitled to be relieved from responsibility as for a total loss.

I have felt the determination of this question, on which this House now differs in opinion from the learned judges who have taken part in the decision in the Court of Session, to be one of considerable difficulty. If by natural causes or by the actings of third parties the ship had been in April, 1896, restored to the appellants without cost to them, though in a disabled condition, but requiring only repairs of less cost than the value of the ship when repaired, the authorities seem to shew that the owners would not have been entitled to prevail in a claim against the underwriters as for a total loss.

In some cases of capture and recapture this has been the result. These cases have, no doubt, as the respondent's counsel urged, a certain analogy to the present. But it appears to me that there is a material distinction in fact between them and the present case, inasmuch as here (1.) the operations were undertaken and large outlay made by the underwriters, who were themselves the obligants under the contract of insurance, in order, by changing the real state of matters as these had occurred, to get rid of the obligation which they had incurred and which might have been enforced by action brought as for a total loss; and (2.), unlike the cases of recapture in which the vessel is restored in a state fit to take the sea, and in which different considerations may arise from those which determine liability incurred from the ordinary perils of the sea, in this case the vessel is tendered still in a disabled condition requiring large expenditure to make her seaworthy. There is undoubtedly

a broad difference between such a case and those to which it is said to be analogous; and, in agreement with the views of your Lordships, I am not prepared to carry the analogy so far as to apply it in circumstances so different from those of the cases referred to. I cannot think it was the intention of the parties, or that it is according to the true construction of the contract of insurance, that after a total constructive loss has unquestionably occurred it should be in the power of the underwriter, if he can only succeed in inducing the shipowner to delay raising action for the requisite time, by outlays however large and operations however extensive, to reduce a total to a partial loss, and so, if he has become bound to indemnify for a total loss only, to leave the shipowner without indemnity to make large expenditure in repairing the ship to fit her for the sea. The cases decided have never gone this length, and I do not think, when this question is now for the first time raised, that the contract of insurance should be so construed as to enable astute underwriters in this way, as my noble and learned friend on the Woolsack has already said, to turn a total into a partial loss.

On these grounds I am also of opinion that the judgment complained of should be reversed with costs, and the case remitted to the Court of Session that a proof of the facts may be allowed.

Ordered, that the judgment appealed from be reversed; that the cause be remitted to the Second Division to give final judgment after the disputed facts have been ascertained either by proof or by mutual admission; and that the appellants have their expenses in the Court of Session after the date of closing the record, and their costs of this appeal.

Lords' Journals, July 11, 1898.

Agents for appellants: *Learoyd, James & Mellor, for James Russell, S.S.C., Edinburgh.*

Agents for respondent: *William A. Crump & Son, for Webster, Will & Co., Edinburgh.*

[HOUSE OF LORDS.]

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INGLIS . . . . . APPELLANT;

AND

ROBERTSON AND BAXTER . . . . RESPONDENTS.

Factor—Pledge—Documents of Title—Foreign Arrestment—Conflict of Laws—Goods in Scotland—Factors Acts, 1889, 1890 (52 & 53 *Vict. c.* 45, *ss.* 3, 9; 53 & 54 *Vict. c.* 40, *s.* 1).

Where goods are lodged in warehouses in Scotland a pledgee of the goods must, to make effective all real rights which depend on the constructive delivery of the goods, give notice of the pledge to the warehouse-keeper.

The Factors Act, 1889, extended to Scotland by the Factors (Scotland) Act, 1890, enacts—s. 3: "A pledge of the documents of title to goods shall be deemed to be a pledge of the goods"; and s. 1: "For the purposes of this Act" (sub-s. 5) "The expression 'pledge' shall include any contract, pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability." Sect. 9 prescribes that the effect of delivery or transfer of the documents of title of the goods under any pledge, &c., by a person who having bought the goods obtains with the consent of the seller possession of the goods or documents of title, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Goods were stored by G., a domiciled Englishman, in a bonded warehouse in Glasgow, transferred into the name of G. as owner; and the warehouse-keeper issued to G. delivery orders shewing that the goods were held to G.'s order "or assigns by indorsement hereon." G. obtained a loan from I., an English merchant, and delivered to him in England a letter of hypothecation bearing that he deposited a part of the goods with him in security, with power of sale, and G. indorsed and handed to I. the delivery warrants. I. did not intimate or give notice of the right he had acquired to the warehouse-keeper. R. & B., claiming as personal creditors of G., arrested the goods in the hands of the warehouse-keeper in order to found jurisdiction against G. in Scotland; and then raised an action against him in the Scottish Court, upon dependence of which they again arrested the goods, claiming through the arrestment a preferable right thereto:—

Held, affirming the decision of the majority of the whole Scottish judges, that the case was governed by the law of Scotland, and that the right of the pledgee, I., in the goods was defeated by the arrestment executed by R. & B., I. not having intimated his pledge to the warehouse-keeper:

Held, also, that s. 3 of the Factors Act, 1889, was merely intended to

define the full effect of the pledge of the documents of title made by a mercantile agent, and that it had no application to the case of the pledge of the documents of title by one in the position of G., who was not a mercantile agent within the meaning of the Act; nor was G. a pledgor within s. 9 of the same Act.

APPEAL from a decision of the majority of the whole judges of the Court of Session, Scotland. (1) The facts were given as follows by Lord Watson:—

"Walter C. Goldsmith, a wine merchant in London, purchased, in December, 1893, from the respondents Robertson and Baxter, who are wine and spirit merchants in Glasgow, a quantity equal to 600 hogsheads of blended Scotch whisky deliverable during the year 1894. The whisky was stored in a bonded warehouse at Glasgow. From the productions made by the appellant in this process it appears that Goldsmith after his purchase had the whisky transferred to his name in the books of the Clyde Bonding Company, and obtained from them delivery orders in these or similar terms: 'Warrant for ten hogsheads, whisky transferred in our books, and held to the order of Walter C. Goldsmith or assigns by indorsement hereon.'

"In December, 1894, Goldsmith obtained a loan of 3000*l.* from the appellant, an English merchant, to whom he delivered a letter purporting to hypothecate 180 hogsheads and 101 quarter casks of Scotch whisky as per schedule annexed, in security for the loan, with interest at 7*l.* per cent. per annum, and containing a power of sale. The whisky thus hypothecated was part of the quantity which had been purchased from the respondents by Goldsmith, and was still lying in his name in the bonded warehouse at Glasgow. Along with the letter Goldsmith indorsed and handed to the appellant the warrants which he held for delivery of the whisky. The appellant did not intimate the right and interest which he had thus acquired in the whisky to the keepers of the bonded warehouse.

"Goldsmith having failed to make payment to the respondents, Robertson and Baxter, of the sum of 1000*l.* 10*s.* 6*d.*, being the balance of price then remaining due to them, they, on

(1) 24 R. 758.

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February 11, 1895, arrested the whisky in the hands of the Clyde Bonding Company in order to found jurisdiction against their debtor, and then raised an action against him before the Court of Session, upon the dependence of which they again arrested the whisky on February 18, 1895.

"Under an arrangement made between the respondents and Alfred Cotton Harper, chartered accountant in London, as trustee administering the estate and affairs of Walter C. Goldsmith, the whisky was sold in April, 1895, upon consignation of the sum of 1000*l.* in the British Linen Company's Bank, Edinburgh, as a surrogatum for the goods sold, subject to the arrestments and claims of all parties who had an interest in the whisky. The present action of multiple-poinding was thereafter brought by the holders of the consigned fund, and two competing claims were lodged, which have been keenly contested and have led to this appeal. The respondents claim the fund in medio, not as having a right of retention or other interest as unpaid sellers of the goods, but as personal creditors of Goldsmith, in whose name as owner the goods were at the dates of their arrestments held in Scotland by the actual custodiers, the Clyde Bonding Company. The appellant, on the other hand, claims an interest in the fund in medio preferable to that of the respondents, upon the ground that, prior to the date of their arrestments, he had become pledgee and indorsee of the delivery orders which constituted the documents of title to the goods within the meaning of the Factors Act, 1889. He maintains that the legal effect of such a pledge, both according to the law of England, and according to the law of Scotland as altered by the provisions of the Factors (Scotland) Act, 1890 (1), was to vest the property of the goods in him."

(1) By s. 1, sub-s. 1, of the Factors Act, 1889: "The expression 'mercantile agent' shall mean a mercantile agent having, in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods:

"(2.) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person, subject to his control or for him or on his behalf:

"(3.) The expression 'goods' shall include wares and merchandise:

"(4.) The expression 'document of title' shall include any bill of lading,

The agreement of deposit or hypothecation by Goldsmith to the appellant was as follows: "London, December 18th, 1894.

dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize either by indorsement or by delivery the possessor of the document to transfer or receive goods thereby represented."

"(5.) The expression 'pledge' shall include any contract, pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability."

Sects. 2 to 7 of the Act come under the heading, "Dispositions by Mercantile Agents."

Sect. 2 is as follows: "(1.) Where a mercantile agent is, with the consent of the owner, in possession of goods, or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same."

Sect. 3 provides: "A pledge of the documents of title to goods shall be deemed to be a pledge of the goods."

Sects. 8 to 10 come under the words "Dispositions by Sellers and Buyers of Goods."

Sect. 8: "Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."

Sect. 9: "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

Sect. 10: "Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage in transitu as the transfer of a bill of lading has for defeating the right of stoppage in transitu."

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—In consideration of your advancing to me the sum of 3000*l.*, I hereby deposit with you (having full power and authority to do so) the wines and spirits specified in the schedule hereto, as a security for the payment of the said sum of 3000*l.*, with interest thereon until the date of payment at the rate of 7*l.* per centum per annum, with full power for you to sell the same without further consent from me, either by public or private sale, at your option, in the event of my not paying the said amount and interest when demanded; and after reimbursing yourself out of the proceeds, all charges, commissions, and expenses of every description attending such sale or sales, and consequent upon my making default in payment of the said principal and interest, you are to apply the remainder of such proceeds in payment of the principal and interest for the time being owing on this security; and in case of deficiency I will make up and pay to you such deficiency on demand: And I agree to pay all charges of every description in connection with the said wines and spirits and the deposit thereof until redeemed by me."

Then follows a schedule giving certain quantities of whiskies.

The form of the delivery order was as follows:—

"I.—Delivery order granted by THE CLYDE BONDING COMPANY in favour of WALTER C. GOLDSMITH.

Office, 56, Hope Street,
Glasgow, 17th December, 1894.

Warrant for ten hhds. whisky transferred in our books and held to the order of Walter C. Goldsmith or assigns by endorsement hereon.

Rent commences 3/6/95.

$\frac{94}{359}$ $31/40 Ten hhds. whisky.

F O

p. CLYDE BONDING CO.
3d. Stp.
JNO. W. MATHIESON.

Endorsed on Back—

WALTER C. GOLDSMITH.
R. W. INGLIS.

Transfer to my name.
pro J. W. BASHFORD.
W. J. PENWARDEN."

Certain conditions were printed on the back of the delivery order which it is unnecessary to give.

The appellant in his condescendence (art. 1), after giving an account of the loan, continued as follows: "The transaction in question was entered into between the claimant and the said W. C. Goldsmith in England, both parties being domiciled in that country. The said agreement was executed in England, and the warrants indorsed and delivered in England. By the law of England, the said agreement, indorsement, and delivery effected a transfer of the ownership of the whiskies to this claimant, or otherwise pledged the said goods to this claimant, so as to give him a right to said goods preferable to any arrestments subsequently used by creditors of the said W. C. Goldsmith, or otherwise transferred to this claimant a right in security preferable to any right or claim founded on the arrestments used by the said Robertson and Baxter. The fund in medio consists of the proceeds of said whisky." And the respondents answered thereto: "Admitted that the claimant Inglis advanced to Goldsmith the sum of 3000*l.* on loan, and that both he and Goldsmith were domiciled in England, and this loan transaction was entered into in that country. . . . Explained that the claimants Robertson and Baxter, who claim the fund in priority to this claimant, are domiciled in Scotland, and that they claim in respect of arrestments duly used by them against the said whisky according to the law of Scotland. Explained that the claimant Inglis did not get delivery, and was never in possession of the whisky referred to in the said agreement. These spirits remained in the possession of Goldsmith, and lay in his name in the custody at the Clyde Bonding Company in their stores in Glasgow, until sold on or about the month of June, 1895, by arrangement. . . . Explained further that the 'warrants' (or delivery orders) referred to in the agreement founded on were as follows: [gives as above] and that although these 'warrants' for the spirits in question were indorsed by Goldsmith and handed to the claimant Inglis when the loan was made, the claimant Inglis gave no intimation thereof to the Clyde Bonding Company, and did not claim or receive delivery or possession of said goods under said warrants,

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nor were the same and the spirits at any time deposited with him as stated in the agreement founded on. . . . Explained that a 'warrant' is only an authority to the holder to claim and receive possession of the goods mentioned therein. The claimant Inglis neither claimed nor received possession of these goods, and failed duly to complete his title thereto."

The condescendence further set out the facts of W. C. Goldsmith's assignment for the benefit of his creditors in February, 1895, and the fact of the respondents' arrestment in Scotland.

The Lord Ordinary (Lord Kyllachy) on March 20, 1896, sustained the claim of the respondents. The appellant reclaimed to the Inner House, and the Second Division ordered minutes of debate or arguments to be printed and laid before the whole Court. On March 18, 1897, the Second Division, in conformity with the opinions of the whole judges (except Lord Young, who dissented), found in favour of the respondents, and the Lord Ordinary's interlocutor was affirmed.

March 15, 17. *Pyke, Q.C.*, and *Morten* (with them *Wootten*), for the appellant. The appellant claims, first, under s. 3, and, secondly, under s. 9 of the Factors Act, 1889, extended in the next year to Scotland. By s. 3 a pledge of the documents of title is a pledge of the goods, and the delivery order or warrant which Goldsmith indorsed and delivered over to the appellant came within the definition of documents of title. Goldsmith was within this section. Then as to s. 9, Goldsmith was in the position of a person who having bought or agreed to buy goods obtained with the consent of the seller (which consent here must be inferred from the facts) possession of the goods. And he must be taken to have delivered or transferred in the terms of the section the documents of title to the goods under a pledge, or an agreement to pledge the goods, or under a pledge of the documents of title, and this under s. 3 operated as an effectual and complete pledge of the goods. The word "pledge" by s. 3 is to bear its natural meaning; and if it is confined and limited to "pledges" by "mercantile agents," mercantile agents will have a greater power given to them than is given to principals: see as to the effect of the heading to a

section: *Union Steamship Company of New Zealand* v. *Melbourne Harbour Trust Commissioners.* (1) Sect. 3 did not effect any revolutionary change in the law of Scotland, for these documents have been looked upon as the goods themselves. It simply has the effect of rendering intimation to the warehouse-keeper unnecessary. It must be admitted that, apart from the Factors Acts of 1889, 1890, the appellant could not make good his title in Scotland as against the respondents' arrestment.

[They also commented on 4 Geo. 4, c. 83; 6 Geo. 4, c. 94; 5 & 6 Vict. c. 39, s. 4; 40 & 41 Vict. c. 39; the Sale of Goods Act, 1893, s. 25; Benjamin on Sales, 4th ed. p. 603; *Farina* v. *Home* (2); *Vickers* v. *Hertz* (3); *Glyn, Mills, Currie & Co.* v. *East and West India Dock Co.* (4)]

[LORD HERSCHELL mentioned *Sewell* v. *Burdick.* (5)]

Upjohn, Q.C., Younger (of the Scottish Bar), and *D. D. Robertson,* appeared for the respondents, but were not called upon.

The House took time for consideration.

EARL OF HALSBURY L.C. In this case the question to be determined is whether a certain parcel of whisky—or rather the sum of 1000*l.* 10*s.* 6*d.*, representing its value—belongs to the respondents in this appeal; and it cannot be doubted that, unless the Factors Act, 1890 (53 & 54 Vict. c. 40) (extending the English Factors Act, 1889 (52 & 53 Vict. c. 45) to Scotland), is in the way of the respondents who arrested the whisky in the hands of the Clyde Bonding Company, the creditors (that is to say the respondents, who have so arrested the whisky) are entitled to the sum in question.

The section in respect of which the question arises is the 3rd section, which enacts that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." It can hardly be denied that if that section is applicable to this case the pledging of the documents of title would be for all purposes

(1) (1884) 9 App. Cas. 365, 368.
(2) (1846) 16 M. & W. 119.
(3) (1871) 2 Sco. & D. 113.
(4) (1882) 7 App. Cas. 591.
(5) (1884) 10 App. Cas. 74.

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as valid to constitute an actual right in the goods themselves as if the goods themselves had been physically handed over to the pledgee. But the only point in this case seems to me to depend upon whether that section is applicable to the facts in this case; and that in turn depends upon whether the person pledging comes within that part of the statute which the Legislature has separated from the other parts of the statute as applicable to "Dispositions by Mercantile Agents."

The Act, which is a consolidation Act and also an amending Act, is separated into parts. Sect. 1 is "Preliminary," and the definition of a mercantile agent is: "A mercantile agent shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

From the 2nd section to the 7th inclusive the Legislature has enacted what shall be the law in respect of "Dispositions by Mercantile Agents." From the 8th to the 10th, "Dispositions by Sellers and Buyers of Goods," and the 11th to the 17th are described as "Supplementary."

I cannot doubt that each of the sections included in this separate portion of the statute must be read as only applicable to the cases of persons indicated by that separate part of the statute; and, if so, it seems to me that the case is free from doubt, since under the circumstances of this case there was no disposition by a mercantile agent.

This seems to me to dispose of the case, though indeed it was suggested that under the 9th section (which comes within the part of the statute applicable to sellers and buyers of goods) it might be contended here that these goods were obtained with the consent of the seller and under the conditions prescribed by that section. But it appears to me the facts raise no such question.

I have referred to the English Act exclusively in what I have said simply because the Act has been extended in its operation to Scotland, subject to certain provisions not relevant to any question raised in this case. If the general law of Scotland be different from that of England in respect of pledges, though I

do not say it is, that Act certainly did not purport to alter, nor did it in fact alter, in any other respect than that specially enacted, the law of Scotland as it stood at the passing of the Act.

I am, therefore, of opinion that this appeal should be dismissed with costs; and I move your Lordships accordingly.

LORD WATSON, having stated the facts as above given, continued:—

I do not find it necessary to consider, for the purposes of this appeal, whether, or in what circumstances, according to the law of England, a valid pledge of documents of title to goods stored in a bonded warehouse will enable the pledgee to defeat the right of a creditor of the person who in the warehouse books is entered as the owner of the goods. The present question does not arise between two Englishmen, nor does it arise in relation to mercantile transactions which can reasonably be characterised as English. The situs of the goods was in Scotland. The Scottish creditors who claim their proceeds did not make any English contract; and in order to attach them they made use of the execution which the law of Scotland permits for converting their personal claim against the owner into a real charge upon the goods themselves. It would, in my opinion, be contrary to the elementary principles of international law, and, so far as I know, without authority, to hold that the right of a Scottish creditor when so perfected can be defeated by a transaction between his debtor and the citizen of a foreign country which would be according to the law of that country, but is not according to the law of Scotland, sufficient to create a real right in the goods.

I can see no reason to doubt that, by Scottish law as well as English, the indorsement and handing over of delivery orders in security of a loan, along with a letter professing to hypothecate the goods themselves, is sufficient in law, and according to mercantile practice, to constitute a pledge of the documents of title, whatever may be the value and effect of the right so constituted. In my opinion, the right so created, whether in England or in Scotland, will give the pledgee a right to retain

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the ipsa corpora of the documents of title until his advance is repaid. The crucial question in this case is whether the right goes farther, and vests in the pledgee of the documents, not a jus ad rem merely, but a real interest in the goods to which these documents relate. That is a question which I have no hesitation in holding must, in the circumstances of this case, be solved by reference to the law of Scotland. The whisky was in Scotland, and was there held in actual possession by a custodier for Goldsmith as the true owner. That state of the title could not, so far as Scotland was concerned, be altered or overcome by a foreign transaction of pledge which had not, according to the rules of Scottish law, the effect of vesting the property of the whisky, or, in other words, a jus in re, in the pledgee.

I have been surprised by the suggestion, which appears to have found favour with one of the learned judges in the Court below, that the recent decision of this House in *North Western Bank* v. *Poynter, Son & Macdonalds* (1) is an authority for holding that this appeal ought to be decided according to English law. The circumstances of that case appear to me to stand in marked contrast to the facts of this appeal. There a Liverpool firm owned and held the bills of lading of a cargo destined to the port of Glasgow. The firm obtained an advance from a Liverpool bank, to whom they, as a security, duly indorsed the bill of lading, which carried the property of the goods according to Scottish as well as English law. The bank sent the bill of lading, without indorsing it, to the pledgors in Liverpool in order that they might act as the agents of the bank in selling the cargo, and receiving and accounting for the price. Upon that footing the pledgors sold the cargo, and a Scottish creditor, to whom they owed a personal debt, arrested the price in the hands of the purchaser in Scotland, and claimed a preferable right to it, upon the ground that by the law of Scotland the pledgees had lost their right of property in the cargo, which had reverted to the pledgors in consequence of their having returned the bill of lading to them for a temporary and special purpose. I thought

(1) [1895] A. C. 56.

at the time, and I remain of opinion with my noble and learned friend Lord Herschell, that, in these circumstances, the relative rights of the pledgor and the pledgee depended upon the law of England, the country in which the pledge of the bill of lading was made, and in which the facts which were said to have destroyed the right of the pledgees occurred. I am not prepared to hold that, whenever the cargo of a ship is destined to a port in one country, the dealings of the owner of the cargo with the bill of lading which represents and carries the property of the goods must in every other country be governed by the law of the locus where the ship is to unload.

It was not disputed by the appellant's counsel, and it is hardly necessary to repeat, that by the common law of Scotland the indorsation and hypothecation of delivery orders, although it may give the pledgee a right to retain the documents, does not give him any real right in the goods which they represent. He can only attain to that right by presenting the delivery orders to the custodier by whom they were granted, and obtaining delivery of the goods from him, or by making such intimation of his right to the custodier as will make it the legal duty of the latter to hold the goods for him. His right, which in so far as it relates to the goods is in the nature of a jus ad rem, will be defeated if, before he has either obtained delivery or given such intimation, the goods are validly attached in the hands of the custodier by a creditor of the person for whom the custodier holds them.

It was argued, however, that the common law of Scotland has been materially altered by the provisions of the Factors Act, 1889, their effect being that a pledge of the documents of title is by itself sufficient to carry a real right to the goods; and that the pledgee of the documents, from the moment when his right is completed by indorsation and delivery, is in the same position as if he had been pledgee of the goods and had obtained possession of them. The statute of 1889 is an English Act, which consolidates and repeals the previous Factors Acts from 4 Geo. 4, c. 83, to 40 & 41 Vict. c. 39. But, by the Factors (Scotland) Act, 1890, the whole provisions of the English statute of 1889 are extended to Scotland, and must therefore be

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construed as if they had originally been made applicable to that country.

Two clauses of the Act of 1889 were founded on by the appellant. The first of these is s. 3, which enacts that "a pledge of the documents of title to goods shall be deemed to be a pledge of the goods." So far as it applies, the language of that clause is unambiguous. It provides that to that extent a pledge of the documents of title shall, although in point of fact it is not so, be nevertheless regarded in law as equivalent to a pledge of the goods. If the enactment had been embodied in a statute which contemplated an alteration of the general law with regard to contracts of pledge in Scotland, I should have had little difficulty in holding that its effect would have been to make a pledge of the documents of title in all cases equivalent to a completed pledge of the goods themselves. But I am unable to come to the conclusion that the clause was meant to be, or is, of general application. It is one of a group of clauses which are collected under the statutory heading, "Dispositions by Mercantile Agents"; and an examination of the context of these clauses shews conclusively, in my opinion, that the enactments of s. 3 were merely intended to define the full effect of a pledge of the documents of title made by a mercantile agent under and by virtue of one or other of the sub-sections of the preceding clause (s. 2). Accordingly, s. 3 has, in my apprehension, no application to the case of a pledge of documents of title by one who was in the position of Goldsmith, or by any other person who is not a mercantile agent within the meaning of the Act of 1889.

The other clause founded upon by the appellant was s. 9, one of a group of clauses which occur under the statutory heading "Dispositions by Sellers or Buyers of Goods." The main if not the sole object of these clauses appears to be this—to protect the purchaser or pledgee of documents of title deriving right from one who is lawfully in possession of them against a claim of retention for unpaid price, or a right of stoppage in transitu, by the original seller, in cases where the purchaser or pledgee has had no notice of such claim or right. Goldsmith, from whom the appellant derived his right as pledgee to the

documents of title representing the whisky in question, was not a pledgor within the meaning of s. 9, who must be a person who has obtained the documents of title either from his seller, or with consent of his seller. Goldsmith did not obtain the documents of title which he pledged to the appellant from the respondents, who were his sellers, or with their consent. He got the documents in his own right and in his own name, as owner of the whisky, directly from the warehousemen after the goods had been transferred to his name in the warehouse books.

I am therefore of opinion that the interlocutor appealed from ought to be affirmed with costs.

LORD HERSCHELL. [His Lordship stated the facts, and continued :—]

It was admitted on behalf of the appellant that, apart from the provisions of the Factors Act, 1889, which were extended to Scotland by an Act of the year 1890, the claim of the respondents as arresting creditors must prevail. The question turns, then, on the construction of certain provisions of the Act of 1889. The section mainly relied on is the third, which is in these terms: "A pledge of the documents of title to goods shall be deemed to be a pledge of the goods."

I think that in the present case there was a pledge of documents of title to goods. They were indorsed and handed to the appellant as security for an advance, and he was clearly entitled to hold them until the advance had been repaid. This appears to me to have constituted a pledge of the documents, and I fail to see how it was any the less a pledge because the agreement of December 18 was at the same time executed by Goldsmith. But it is not necessary in the view I take to express an opinion upon the point so much discussed in the judgments in the Court of Session, whether the effect of the enactment is to put the pledgee of the documents of title in the same position as if he had received possession of the goods to which the documents relate. I think the enactment has no application to the present case, inasmuch as the pledge was not a disposition by a mercantile agent, and, in my opinion, it is to such dispositions only that the section applies. It is true

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that it is general in its terms, but it is one of a group of sections headed "Dispositions by Mercantile Agents." The Act is divided into parts. The first, headed "Preliminary," consists of a definition clause. The last part, headed "Supplemental," contains provisions as to the mode of transfer "for the purposes of this Act," and certain savings. The other two parts are headed respectively "Dispositions by Mercantile Agents," and "Dispositions by Buyers and Sellers of Goods." These headings are not, in my opinion, mere marginal notes, but the sections in the group to which they belong must be read in connection with them and interpreted by the light of them. It appears to me that the Legislature has clearly indicated the intention that the provisions of s. 3 should not be treated as an enactment relating to all pledges of documents of title, but only to those effected by mercantile agents.

The only other section relied on by the appellant is the 9th. I think this section also is inapplicable to the case before your Lordships. I am not satisfied, as at present advised, that the section applies in any case where no right to the goods or the documents of title remains in the seller who has parted with possession of them. But I do not decide this point. The possession of the documents of title which were pledged was obtained from the warehouse keeper by the appellant by virtue of his ownership of the goods. They had already been transferred into his name by the warehouse keeper, and were held for him before the warrants were delivered. I think, in these circumstances, it cannot properly be said he obtained possession of them "with the consent of the seller."

For these reasons, I think the judgment appealed from should be affirmed and the appeal dismissed with costs.

LORD MACNAGHTEN and LORD MORRIS concurred.

Appeal dismissed with costs.

Lords' Journals, July 11, 1898.

Agents for appellant: *Irvine & Borrowman, for Beveridge, Sutherland & Smith, S.S.C., Leith.*

Agent for respondents: *F. W. Reynolds, for Morton, Smart & Macdonald, W.S., Edinburgh.*

[HOUSE OF LORDS.]

CORPORATION OF GLASGOW . . . APPELLANTS;

AND

GLASGOW TRAMWAY AND OMNIBUS COMPANY, LIMITED . . . . . RESPONDENTS.

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July 11.

Lease—Landlord's Rates and Taxes—Tramway—Covenant by Tenant to keep free from all Expenses whatever—Valuation of Lands (Scotland) Act, 1854 (17 & 18 *Vict. c.* 91), *s.* 6.

By s. 6 of the Valuation of Lands (Scotland) Act, 1854, it is enacted that a tenant whose name has been entered in the valuation roll as proprietor "shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor of such proportion of all assessments laid on upon the valuations of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation."

The corporation of Glasgow agreed to borrow money and to construct certain tramways in Glasgow and lease the undertaking to the Glasgow Tramway Company for twenty-three years. The company agreed to make various payments to the corporation, and then agreed as follows: "And the company shall also pay to the corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways." The lease exceeding twenty-one years, the company, under the Valuation of Lands (Scotland) Act, 1854, s. 6, became primarily liable to pay and did pay during the whole term of the lease, "owner's assessments, rates, and taxes," amounting in the aggregate to over 14,000*l.* During the currency of the lease the company intimated to the corporation that they had a claim in this respect, but did not make any deduction from the rent when paid. The company contended that the corporation ought to reimburse them these outgoings, or such other sum as might be ascertained to be the amount of owner's assessments, rates, and taxes paid by the company during the lease:—

Held, reversing the decision of the First Division of the Court of Session, that the assessments, rates, and taxes, whether imperial or local, levied on the owner in respect of a tramway or other erection in solo, were an

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expense connected with the tramway or erection, and that the company were bound by their lease to relieve the corporation from these expenses, and were not entitled to claim reimbursement.

APPEAL from a judgment of the First Division of the Court of Session, Scotland. (1)

The interlocutors under appeal were pronounced in conjoined actions between the appellants, the Corporation of the City of Glasgow, and the respondents, the Glasgow Tramway and Omnibus Company, who for twenty-three years worked the tramways laid in the streets of Glasgow. Various questions were raised and decided in these actions, but the only question in the appeal was whether the appellants were liable to make payment to the respondents of a sum of 14,246*l.* 5*s.* 0½*d.*, "or of such other sum as shall be ascertained in the course of the process to follow hereon to be the amount of the landlord's or owner's assessments, rates, and taxes, whether local or imperial, paid by the pursuers (the respondents) for the period between July 1, 1871, and July 1, 1894, in respect of the tramways leased by them from the defenders (the appellants), or the proportion of such payment of which the defenders are bound to free and relieve the pursuers," with interest. The facts and the material provisions of the agreement admitted to be a lease are given in the judgment of Lord Watson.

Feb. 28; March 1, 3. *Haldane, Q.C.*, and *Cripps, Q.C.* (with them *Alexander Wood Renton*), for the appellants. The decision of the Court of Session on this point was erroneous. By art. 2 of the agreement or lease the corporation were to be kept clear of all expenses. This must be taken to mean clear of rates and taxes and other outgoings. The corporation were to obtain the money, and the arrangement on the other side was that the company were to pay interest to be set aside as a sinking fund to be applied to the extinction of the cost of making the tramways. The company also were bound to repair and maintain the tramways, and hand them

(1) 24 R. 628.

back at the end of the lease in as good condition as when given over; to pay 150*l.* per annum for every mile of street whereon tramways were opened—a kind of wayleave; to pay a percentage on the money expended in constructing the tramways which was to be set apart and expended in renewals; and to invest a large sum in heritable property as security, so that the corporation should be saved from all liability and risk as far as possible, and kept free from all expenses in connection with the tramways; and rates and taxes were expenses called into existence by the agreement or lease.

Secondly, and alternatively, the company have barred themselves from now making this claim by mora. The deduction of rates and taxes should have been made year by year. The last word concerning taxes was said in 1882, and the company go on paying taxes until the expiry of the lease: see *Cook* v. *North British Ry. Co.* (1) and *Ramsden* v. *Dyson.* (2)

Balfour, Q.C., and *William Campbell* (both of the Scottish Bar), for the respondents. The company are entitled to claim relief under the 6th section of the Valuation of Lands (Scotland) Act, 1854. At the end of the lease the corporation had the whole tramways handed back without payment. The mileage of 150*l.* per mile brought in from 800*l.* to 3000*l.* a year, and an aggregate of 44,000*l.* was paid in this way as rent. Rates and taxes were well-known things, but "expenses" meant, not lessor's rates and taxes, but things which might arise in certain contingencies, and which were not in the contemplation of the parties, and such outgoings could not have been meant to include rates and taxes. Then as to mora. The right to relief had never been abandoned. There was no concealment of intention. The corporation knew the company made this claim. If the company had deducted landlord's rates and taxes from the rent yearly, it would have given them great trouble; and there was no hurry to sue until the end of the lease. Payment year by year was no representation of intention, and indeed the question was raised in 1881 and 1882, when it was distinctly stated that although the company paid the payment was not to prejudice their case.

(1) (1872) 10 M. 513. (2) (1866) 1 E. & I. 129.

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[They cited *Mitchell* v. *Heys & Sons* (1), *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (2), *Fowler* v. *Mackenzie* (3), *Jorden* v. *Money* (4), and *Chadwick* v. *Manning*. (5)]

Cripps, Q.C., in reply.

The House took time for consideration.

EARL OF HALSBURY L.C. In this case the whole question turns upon the true construction of the contract between the appellant corporation and the Glasgow Tramway Company.

The city of Glasgow agreed to construct certain tramways, and leased the undertaking to the respondent company. It is clear that but for the stipulation in the agreement the respondent company would have had a right to claim indemnity against the city of Glasgow in respect of owners' assessments, rates, and taxes, whether local or imperial. But the answer to that claim is that the respondent corporation has undertaken to bear those burdens themselves, and the sole question is, as I have said, the construction of the particular stipulation which has thus been made.

Now that stipulation is in these terms: "And the company shall pay to the corporation the expenses of borrowing, management," &c. And it proceeds thus: "This provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways."

That the rates and taxes levied upon the tramways as such, and the expenses involved in making payments in respect of them, are "expenses" within the strictest meaning of those words, appears to me to be beyond doubt. And the words "free from all expenses whatever in connection with the said tramways" appear to me to be so wide in their application that I should have thought it impossible to qualify or cut them down by their being associated with other words on the principle of their being ejusdem generis with the previous words enumerated.

(1) (1894) 21 R. 600.
(2) (1873) 6 E. & I. 352.
(3) (1874) 11 Sco. L. R. 485.
(4) (1854) 5 H. L. C. 185.
(5) [1896] A. C. 231.

"Expenses," I presume, is itself a very general word; but the construction which limits that word would be strange indeed which would strike out the word "all" and the word "whatever" from the sentence. Neither does it appear to me very intelligible why where the assessment is upon the tramway itself it is not an "expense in connection with the tramway."

For these reasons I am of opinion that the judgment of the Court of Session was erroneous and I think it ought to be reversed, and I move your Lordships accordingly.

LORD WATSON. The appellant corporation, having obtained statutory authority to construct tramways upon the streets of the city of Glasgow, entered, in May, 1871, into an agreement with the promoters of the respondent company, which was then in course of formation, by which the corporation undertook, upon the terms and conditions therein specified, to construct certain tramways upon the streets of the city, and thereafter to grant a lease of the said tramways to the company for the period of twenty-three years. The corporation proceeded to construct the tramways, and on their completion effect was given to the agreement by embodying its stipulations in a contract of lease between the parties, which was duly executed by the corporation and by the company upon the 16th and 17th days of November, 1871. By the lease the corporation demised to the company "the sole right to use for the sole purposes of the Glasgow Street Tramways Act, 1870, carriages with flange wheels, or other wheels specially adapted to run on a grooved rail, on the whole tramways authorized to be formed by the said Act, and that for the space of twenty-three years from and after the 1st day of July, 1871."

The tenure of the respondent company being for a period exceeding twenty-one years, the assessor, following the provisions of s. 6 of the Valuation Act, 1854, entered their name in the current valuation rolls as "proprietors," with the result that the company became primarily liable to pay, and regularly paid, the assessments yearly levied in respect of the tramways, whether for imperial or for local purposes, during the whole term of the lease, which expired in July, 1894. Sect. 6

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provides that a tenant whose name has been so entered "shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor, of such proportion of all assessments laid upon the valuation of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation." During the currency of their lease, the company, although they intimated a claim against the corporation, did not make any deduction from the rents which they paid to the corporation in compliance with the conditions of the lease.

This action was brought in January, 1896, and the first, and the only, conclusion of the summons to which the present appeal relates is for payment by the corporation to the company of the sum of 14,246*l.* 5*s.* 0½*d.* sterling, or of such other sum as may be ascertained to be the amount of owners' assessment, rates, and taxes, whether local or imperial, paid by the company for the period between July 1, 1871, and July 1, 1894, in respect of the tramways leased to them, or the proportion of such payments of which the corporation were bound to relieve them. In defence to that conclusion, the corporation pleaded (1.) that, by the conditions of the lease, the respondent company were bound to free and relieve them of those assessments; (2.) that, upon a sound construction of s. 6 of the Valuation Act, the only right of recovery given to the company as tenants was by deducting the amount of such assessment from the rent payable by them to the corporation under the lease—a remedy which the company had failed to pursue, and had therefore lost; and (3.) that assuming the company to have had, under s. 6 of the Act of 1854, the alternative remedy of recovering these assessments by legal process, their claim was, in the circumstances of the case, barred by taciturnity and mora. If any one of these three pleas in defence be sustained, the claims for relief made by the company must necessarily fail.

After a proof had been led, the Lord Ordinary (Kyllachy) on December 2, 1896, found that the corporation were bound to relieve the company of the owners' assessments, rates, and

taxes, whether local or imperial, paid by them in respect of the tramways during the period from July 1, 1871, to July 1, 1894. He made various subordinate findings bearing upon the proportion of assessments chargeable to the corporation; and seeing that further inquiry was necessary upon one point, he directed the cause to be enrolled for further procedure. His Interlocutor was, on March 4, 1897, affirmed simpliciter by the First Division of the Court. (1)

The first plea urged in defence by the corporation depends upon the just construction of a single sentence in the 2nd article of the lease of November, 1871. That clause enumerates various payments which are to be made by the lessees to the lessors, and then proceeds thus: "And the company shall also pay to the corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways." The question, therefore, comes to be whether the proportion of assessments payable by the corporation as owners of the tramways under s. 6 of the Valuation Act are expenses of the corporation "in connection with the said tramways," within the meaning of the 2nd article, and are therefore within the respondent company's obligation of indemnity.

In my opinion, the conditions of the 2nd article which I have just quoted ought to be construed in connection with the whole stipulations of the lease, in so far as these relate to the considerations passing between the corporation and the company. Viewed in that light, the general scheme of the lease is that the obligation of constructing the tramways was to rest upon the corporation, it being in the contemplation of both parties that the corporation was to raise money for that purpose by borrowing upon its own credit. On the other hand, the company (art. 6) undertook the whole cost of maintenance and repair during the period of their tenure; they (art. 3) agreed to pay half-yearly 3 per cent. per annum on the gross sum from time to time expended by the corporation on capital account, which percentages were to form a sinking fund to be applied "ultimately" by the corporation towards

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the reduction or extinction of the cost of constructing the tramways; by the first part of art. 2 the company agreed to pay half-yearly during the term of their lease the whole interest falling due upon the money from time to time borrowed by the corporation on capital account; by the second part of the same article they agreed to pay interest on the expenses incurred by the corporation and by the Board of Police in obtaining statutory power of construction in the year 1870, or incident to the execution of the lease, it being declared that the obligation of the company for the payment of such interest was not to be effected by any payment made to the corporation through the medium of the sinking fund.

The substance of the scheme, as embodied in these stipulations, appears to me to have been that no pecuniary obligation was to attach to the corporation beyond that of borrowing funds in order to pay for the construction of the tramways; and that the company during the currency of their right were to relieve the corporation of all other outlays connected with or incident to the performance of their obligation to construct, or incident to their position as proprietors of that which they had constructed. I have had no difficulty in coming to the conclusion that payment of assessments, whether imperial or local, levied from the owner in respect of a tramway or other erection in solo is an expense connected with such tramway or erection. But for the construction of the tramway no such liability would have arisen.

I am, for these reasons, of opinion that the first plea is well founded, and that the company are suing for a sum of which they were bound by their lease to relieve the corporation. In that view it is neither expedient nor necessary to express any opinion with regard to the other pleas maintained in defence by the corporation. I think that, in so far as they relate to the first conclusion of the summons, the interlocutors of December 2, 1896, and March 14, 1897, ought to be reversed, and the corporation assoilzied from that conclusion. I also think that the interlocutors of March 14 and March 20, 1897, in so far as they relate to expenses of process, ought to be reversed; and that the appellant corporation ought to have

the expenses incurred by them before the Court of Session, and their costs of this appeal.

LORD HERSCHELL. The only question which has to be determined in this appeal is whether the appellants are bound to relieve the respondents of the landlords' or owners' assessments, rates, and taxes, whether local or imperial, paid by the respondents in respect of the tramways leased by the appellants to the respondents during the period from July 1, 1871, to July 1, 1894, to the extent of such proportion of those assessments, rates, and taxes as corresponds to the rent payable by the respondents to the appellants in respect of the tramways as compared with the amount of the valuation of the tramways under the Valuation Acts.

The question turns, in my opinion, on the construction to be put on a provision in the lease granted to the respondents in November, 1871. By this instrument the appellants let to the respondents the sole right to use, for the sole purposes of the Glasgow Street Tramways Act, 1870, carriages with flange wheels on the whole of the tramways authorized to be formed by that Act for twenty-three years from July 1, 1871. The terms of this lease were (amongst others) that the appellants should make the tramways out of moneys to be raised or borrowed by them, and that the respondents should pay half-yearly to the appellants the amount actually paid or payable on the money borrowed by them and expended on the tramways, and on certain other expenses which were to be regarded as expenditure on capital account. It contained further the following provision. [His Lordship read clause 2, given above:—]

The duration of the lease exceeding twenty-one years, the respondents were, pursuant to the terms of the Valuation of Lands (Scotland) Act, 1854, treated as the proprietors of the heritages, and paid the assessments yearly levied in respect of the tramways whether for imperial or local purposes down to the termination of their lease in 1894. The 6th section of the Act referred to provides: [His Lordship read the portion of the section given above in Lord Watson's opinion.]

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The respondents during the currency of their lease made no deductions in respect of the assessments for rates and taxes paid by them, but they claimed at the termination of the lease to recover from the appellants a proportion of the sums paid by them, in conformity with the provisions of the section of the Act just quoted.

I am of opinion that their claim cannot be sustained. I base this opinion solely upon the construction of the clause of the lease upon which the appellants mainly rely, read of course in the light afforded by all the provisions of that instrument. Several other points were made by the appellants, and questions of some nicety were discussed at the bar, but I do not find it necessary to express any opinion upon these. In the judgment of the Lord Ordinary and in the Inner House stress is laid upon the point that the agreement to pay "the expenses of borrowing, management, &c.," cannot cover the sums now in question, inasmuch as the corporation have not "expended" anything, and "the taxes paid by the owner of property in respect of his ownership are not incidental or ejusdem generis with expenses of borrowing or expenses of management." It is not requisite to consider what the proper conclusion would have been if the agreements had contained only the words "pay the expenses of borrowing, management, &c.," for the parties to the lease have not left the matter to be determined on the use of these words alone. They have gone on to indicate how the provision just alluded to is to be construed. The learned judges have made no allusion to the words, to my mind all important, which require this construction. They have treated them as of no effect. It is, however, competent for the parties to a contract to agree that the language they use shall be so construed as to cover more than would be conveyed by it according to its strict interpretation, or, in other words, to give to it a conventional meaning. If they have done so, the Courts must give effect to their bargain. In the present case the words to which alone allusion is made in the judgment below are followed by the words, "and this provision shall be so construed," &c. Why, then, should it not be so construed as to effect the object which the parties to the

bargain say they had in view, even if this be not its natural construction? I can see no sound reason for failing to give effect to the expressed intention of the parties. The provision is to be so construed "as to keep the corporation free from all expenses whatever in connection with the said tramways." Nothing could be wider than "all expenses whatever"; they seem to me necessarily to exclude any limitation of the expenses to those ejusdem generis with expenses of "borrowing" or "management." If the sums sought to be recovered have to be paid by the appellants, will they be "expenses in connection with the said tramways"? I cannot doubt it. If the tramways had not been made, none of the assessments which have given rise to this controversy could have been imposed. The corporation, so long as the site of the tramway was merely part of the road, were not liable to taxation in respect of it. That liability has arisen only because by virtue of the agreement under consideration the tramways were brought into existence. It seems to me, therefore, clear that, if the contention of the respondents were to prevail, the appellants would not have been kept free from all expenses whatever in connection with the tramways. On the contrary, they would have been compelled to expend a large sum directly in connection with them, and due solely to their existence, and to make this expenditure by means of a payment to the respondents who were to keep them free from all such expenses.

The conclusion at which I have arrived appears to me in complete harmony with the general scheme of the lease and the other provisions contained in it. I do not think it would be giving its true effect to the contract between the parties to hold that, though the respondents would be bound to pay to the appellants all expenditure they had incurred in connection with the tramways, the respondents could claim to be repaid by the appellants expenditure they had themselves made in connection with the tramways.

LORD SHAND. I am also of the same opinion.

The case raises no matter of general interest, but involves merely a question of construction—a question as to what is the

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meaning of the particular terms used in the lease between the parties. I agree in thinking that on the grounds stated by your Lordships, taking the provisions of that lease as a whole, and having regard to the special clause as to expenses, the result is that the appellants are not liable for the sums sued for. I think the word "expense" would have been a better term to be used than "expenses," but that the effect of the word "expenses" is the same, and results in the judgment which your Lordships are now about to pronounce.

Ordered, that in so far as they relate to the first conclusion of the summons, the interlocutors of December 2, 1896, *and March* 4, 1897, *be reversed and the corporation assoilzied from that conclusion; that the interlocutors of March* 14 *and March* 20, 1897, *in so far as they relate to expenses of process, be reversed; and that the appellant corporation have the expenses incurred by them before the Court of Session and their costs of this appeal.*

Lords' Journals, July 11, 1898.

Agents for appellants: *Martin & Leslie, for Simpson & Marwick, W.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Webster, Will & Ritchie, S.S.C., Edinburgh, and Andersons & Pattison, Glasgow.*

[HOUSE OF LORDS.]

NORTH BRITISH RAILWAY COMPANY . . . . . } APPELLANTS;

AND

PARK YARD COMPANY, LIMITED, AND OTHERS . . . . . } RESPONDENTS.

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June 20.

Easement—Tramway agreement—Personal or Real Right—Removal of Tramway.

Where a servitude, such as a right of way for a tramway, is claimed as having been granted by an instrument in writing subscribed by the proprietor of the land burdened, the fact that the dominant tenement has not been acquired at the date of the instrument cannot, after it has been actually acquired, prevent the servitude from becoming a legal accessory to the dominant tenement, provided the servitude was so used as to give reasonable notice of the burden to any person in whom the property of the land might subsequently become vested. And although the instrument granting the privilege was in terms which might appropriately be employed in the constitution of a personal obligation only, that is not conclusive against the constitution of a proper burden upon the land, if it be matter of reasonable inference from the terms of the document, or the circumstances of the case, that the constitution of a real servitude was what the parties contemplated.

An agreement between the proprietor of the estate of W., the feuars of part of that estate, and a railway company, provided for the use and construction by the railway company of a tramway through the lands of W., including the lands of the feuars:—

Held (Lord Morris dissenting), reversing the decision of the Court of Session, that the privilege of working the tramway as long as it continued was intended to bind, and did bind, all singular successors of the feuars in their lands.

APPEAL from a judgment of the First Division of the Court of Session, Scotland. (1)

The question was whether the respondents, the Park Yard Company, Limited, and others, were entitled to have the appellants, the North British Railway Company, ordered to remove a portion of the Whiteinch tramway used for goods traffic. The result of the respondents being successful would

(1) 24 R. 1148.

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have been the cutting into two separate parts the tramway, and the depriving a considerable number of traders whose works are situated on the north bank of the Clyde, in Partrick and Whiteinch, of their connection with the North British Railway's system.

The facts are fully given in the judgment of Lord Watson.

March 3, 4, 17, 18, 21, 24. *Asher, D.F., Balfour, Q.C.* (with them *Cooper*), (all of the Scottish Bar), for the appellants. The decision of the Court of Session was erroneous. The proprietors of the lands through which this tramway runs have granted a positive servitude accessory to the dominant tenement—here the Whiteinch Railway Company's land—of occupying a certain portion of the soil with the tramway rails, and the right to use them for goods traffic. That servitude carried with it the right to do what was necessary to keep the rails in proper working condition: *Pringle* v. *Duke of Roxburgh*. (1) Nor does it matter that the successors of the owners of the lands were not bound in the instrument, the intention being that all parties should have this right. The documents read together shew that the intention was that the tramway should exist as a perpetual undertaking until it ceased to be worked, or the superior of the lands of Whiteinch consented to its removal. A positive servitude such as this was could by the law of Scotland be constituted by a written grant followed by possession and use, even though there be no entry of the writing in the Register of Sasines. The grant is binding on a purchaser of the burdened lands if it is followed by possession: Bell's Prin. s. 990; and it is not inconsistent with the law that there should be a certain amount of exclusion of the owner of the servient tenement; nor is this an unprecedented servitude: *Addie* v. *Henderson and Dimmack*. (2) There is really no limit to this class of servitude: Stair, bk. 2, tit. 7, and ss. 5, 9, 10; and see *Clelland* v. *Clelland* (3), a servitude of a bridge. The purchaser had an opportunity of inspecting the tramway, and it is enough for the appellants that he had actual

(1) (1767) 2 Pat. 134. (2) (1863) 2 M. 41.
(3) (1619) Mor. Dict. 12,769.

notice: *Muirhead* v. *Glasgow Highland Society* (1); *Stodart* v. *Dalzell* (2); *Petrie* v. *Forsyth* (3); *Kelvinside Estate Co.* v. *Donaldson's Trustees.* (4) Further, the conveyance to the appellants by the Whiteinch Railway Company, including the tramway, was entered on the Register of Sasines, conveyed with the consent of the respondents' predecessor; and the conveyance states that he and the other feuars ceased from its date to have any right or ownership in the tramway. Whether an agreement is permanent or terminal must, if ambiguous language is used, be decided by looking at the intention of the parties, the circumstances of the case, and the language used: *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (5) Here the terms of the documents are altogether inconsistent with the contention that it should be in the power of any one of the feuars or traders to be released from his obligations. Then in the "construction agreement" it is said, "Lastly, no privilege in perpetuity notwithstanding anything in the foresaid agreement to the contrary is given." This must mean not perpetual in the sense the word was used previously in the "working agreement," (art. 1) namely, stipulating for the perpetual working by the appellants, and nothing further, and certainly not that the right was limited to themselves personally. The appellants paid for the whole Whiteinch railway and tramway undertaking 28,000*l.*; and if the respondents are right every feuar to the east of their land would be cut off from connection with the North British Railway's system.

A. Graham Murray, L.A., and *Guthrie, Q.C.* (with them *G. W. Burnet*), (all of the Scottish Bar), for the respondents. If this burden had been intended to be constituted a right against singular successors—that is, purchasers—it ought to have been expressed in clear and unambiguous terms, and this could easily have been done: *Cowan* v. *Stewart.* (6) There is more than one way in which this tramway may come to an end: see clause 8 (7) of the "construction agreement."

(1) (1864) 2 M. 420.
(2) (1876) 4 R. 236.
(3) (1874) 2 R. 214.
(4) (1879) 6 R. 995.
(5) (1875) 7 E. & I. 559, 560.
(6) (1872) 10 M. 735.
(7) See post, Lord Watson's opinion, p. 656.

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Lastly, in the same agreement the feuars expressly gave no warrandice; and, again, they said, "Remember, we give you nothing in perpetuity." (1) Can it be said that there is something in another agreement which takes the edge off that declaration? *Llanelly Railway and Dock Co.* v. *London and North Western Ry. Co.* (2) was a case of one railway company giving another railway company, without any limit of time, running powers. That case did not throw any light on this case. The onus is on those who say this burden on the land is perpetual, and that the feuars' property is not free: *Cowan* v. *Stewart* (3); *Fifeshire Road Trustees* v. *Cowdenbeath Coal Co.* (4) The opinion of the Lord Ordinary (5) was correct that the non-existence at the time of the agreement of a dominant tenement was fatal to the appellants' contention.

Asher, D.F., in reply.

The House took time for consideration.

EARL OF HALSBURY L.C. In this case the question is whether a servitude, or what an English lawyer would call an easement, has been created, and, if so, whether the easement has been so created as to bind the singular successors.

I confess I have not entertained any doubt that, but for what may be called a technical consideration, namely, that in English law an easement can only be created by an instrument under seal, a good easement was here created, and would for the period of its existence, whatever that might be, bind the land into whosesoever hands it might come.

Apart from the difference between English and Scottish law, it does not appear to be denied that such an easement as is claimed here could be created by apt words. Indeed, it would be difficult to say that what, after all, is a right of passage for goods is a servitude or easement unknown to the law, and no particular words are necessary to create such an easement. Any words which shew the intention to give an easement which is by law grantable are sufficient to effect that purpose: see Lord Wensleydale's judgment in *Rowbotham* v. *Wilson*. (6)

(1) See p. 657.
(2) 7 E. & I. 559, 560.
(3) 10 M. 735.
(4) (1883) 11 R. 18.
(5) 24 R. 1152.
(6) (1860) 8 H. L. C. 358.

As to the objection that here was no servient or dominant tenement, which seems to have weighed on the Court below, I am satisfied with the answer given by the Dean of Faculty. I think each of these pieces of land became in turn the servient and the dominant tenement.

But it is said that the parties here have by the language of the instrument negatived the intention to affix permanently to the land these easements. I think that is true. They have affixed a particular term, and when that term is reached the privileges thus granted are to come to an end. But that term has not arrived, and whether or not the instruments themselves disclose the intention to create the easements is a question of the construction of the instruments in question—more particularly that which has been described as the "construction agreement"; and upon that question I can add nothing to the mode in which it has been treated by my noble and learned friend Lord Watson in the judgment which he is about to deliver. I entirely concur in the conclusion at which he has arrived and in the reasoning by which it is arrived at.

Treating the question as one on the construction of these agreements, and assuming there to be no difficulty by reason of the agreements in question not being under seal, it seems to me free from doubt that the parties did intend to create for the period limited to the continued use of the tramways a servitude or easement which would bind the singular successors.

In England, as I have said, the difficulty would arise by reason of the technical rule that no such right could be created except by deed. It was not denied at the bar that that difficulty does not exist according to Scottish law, and that any instrument in writing whereby it should sufficiently appear that it was the intention of the parties to create such a right would be sufficient, and that it would be immaterial for the purpose now in debate whether the writing was under seal or not.

Under these circumstances I think the judgment appealed from was wrong and ought to be reversed. The case should be remitted to the First Division of the Court of Session with directions to assoilize the appellant company from the conclusions of the summons. The respondents should pay to the

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appellants their costs of this appeal and in the Courts below, and I move your Lordships accordingly.

LORD WATSON. On the north bank of the Clyde, and on the western confines of the city of Glasgow, there are two adjoining estates, known respectively as Whiteinch and Scotstoun, which have a frontage to the river. In the year 1872 portions of these estates had been feued out and were occupied as shipbuilding yards and for other manufacturing purposes. The Stobcross section of the North British Railway, which has connections with the rest of the North British system, was situated about two miles to the north of these works, but had no railway or tramway connection with them.

In 1872 a company was formed under the designation of "The Whiteinch Railway Company, Limited," with the object of acquiring the land or the rights over land required for the purpose of forming a branch railway, or siding, leading from the Stobcross section to the north side of the turnpike road between Glasgow and Dumbarton at or near the boundary between the estates of Scotstoun and Whiteinch, "with a tramway or railway leading from the said railway, through the estates of Scotstoun and Whiteinch, and terminating at a point on the estate of Whiteinch, near the shipbuilding yard belonging to Messrs. Barclay, Curle and Company." The undertaking was promoted by persons interested in the lands and works already mentioned. The nominal capital of the company was 18,000*l.*, divided into 1800 shares of 10*l.* each. The memorandum of association was signed by fifteen of the promoters who subscribed for 1400 shares, representing 14,000*l.* of capital, and it was duly registered without articles of association. The company had no statutory authority to acquire land or interests in land by compulsory purchase.

With a view to carrying out their undertaking the promoters of the Whiteinch Company adjusted the terms of two separate deeds of agreement subsequently executed by the company which, in the argument upon this appeal, were referred to as the "construction" and the "working" agreement. The "construction" agreement was executed between (1.) Archibald

Smith, Esq., of Jordanhill, at that time superior of the feued and proprietor of the unfeued portions of the estate of Whiteinch; (2.) the North British Railway Company; (3.) the Whiteinch Railway Company, Limited; and (4.) one shipbuilder on the estate of Scotstoun, and six persons or firms, feuars of parts of the estate of Whiteinch, across whose lands it was intended to carry the tramway. The second, or "working" agreement, was not executed by the superior and proprietor of Whiteinch; but with that and another exception the parties to it were the same with those who executed the first. Both deeds were executed by James Gray Lawrie, engineer and shipbuilder, Whiteinch, who at the time was feuar of that portion of the estate of Whiteinch which now belongs in feu and superiority to the Park Yard Company, Limited, the respondents in this appeal.

The North British Railway Company became parties to both these deeds, because it was matter of arrangement that they should work the Whiteinch Railway, if and when constructed, in connection with their own line, but not the new tramway, they paying a certain proportion of the traffic receipts to the Whiteinch Company, and also that they should have the option of purchasing the Whiteinch branch within four years after its opening.

The Whiteinch Company acquired from the proprietor of Scotstoun a strip of land about four acres in extent, upon which they constructed a station and other works, and also a railway from the Stobcross branch to the north side of the Dumbarton Road. From that point they constructed a tramway, passing at first through the lands of Scotstoun and thence through the estate of Whiteinch, feued and unfeued, including the feu which then belonged to James Gray Lawrie, to a point on the east near to the shipbuilding yard of Barclay, Curle & Co. The North British Company ultimately exercised their option of purchasing the Whiteinch branch; and by a disposition dated in January, 1881, the whole undertaking of the Whiteinch Company, Limited, was conveyed to them, including the right which the Whiteinch Company had in and to the tramway constructed and laid by them upon the lands of Scotstoun

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and Whiteinch, subject to the conditions specified in the "construction" agreement.

James Gray Lawrie, the predecessor of the respondents, had at the time when he became a party to the agreements already mentioned a personal title to his feu; but his feudal title was subsequently completed. The respondents thereafter purchased his feu and obtained a disposition in their favour, which was dated the 9th and recorded on May 11, 1890. They also obtained from the superior a conveyance of the superiority of the feu in the name of two persons who were trustees for their behoof dated the 5th and recorded June 8, 1895. These titles of feu and superiority contain no reference to the tramway.

In the month of June, 1896, the respondents brought the present action against the appellants, the North British Railway Company, and fifteen other defenders, one of them being the superior of the feued and proprietor of the unfeued lands of Whiteinch, the others being feuars of portions of the lands either of Scotstoun or of Whiteinch. The leading conclusion of the summons is for declarator that the respondents are entitled to hold their lands free of any burden, servitude, or restriction whatsoever other than is expressed in their titles to the dominium utile and superiority, and to possess the said lands free of any servitude or burden alleged by the defenders or any of them, and particularly of the right claimed by the defenders, the North British Railway Company, to maintain and use a tramway upon the solum of the respondents' lands immediately to the south of the north boundary thereof." There is an ancillary conclusion to have the appellant company decerned and ordained to remove the said tramway so far as constructed upon the solum of the said lands, and to leave the said subjects void and redd, so that the respondents may have the exclusive use and possession of the same.

The action was defended by (1.) the appellant company; (2.) Mrs. Susan Emma Parker Smith, who is owner of the estate of Whiteinch either in property or superiority; (3.) Charles Connell's trustees, feuars of part of the estate of Scotstoun; (4.) Wylie and Lochhead, feuars of a portion of Whiteinch at

the eastern extremity of the tramway; and (5.) the firm of Barclay, Curle & Co. and others, who are in right of the Whiteinch feu adjacent to that of Wylie and Lochhead.

The Lord Ordinary (Low) (March 9, 1897) repelled the defences, and gave the respondents decree in terms of the conclusions of their summons. On a reclaiming note his interlocutor was affirmed (July 17, 1897) by the First Division, the Lord President delivering the judgment of the Court. (1)

I agree with the Lord President in thinking that the question whether a right of servitude or other burden has been constituted in favour of the appellant company or others depends mainly, if not exclusively, upon the terms of the "construction" agreement. There are no stipulations bearing directly upon that question to be found in the "working" agreement, which chiefly relates to the conditions upon which and the rates at which traffic is to be carried upon the Whiteinch branch. The learned judges both of the Outer and Inner House appear to me to have arrived at their decision upon the ground substantially that any obligation undertaken by or imposed upon the feuars whose land was used for the purposes of the tramway was of a strictly personal character, and could not affect a singular successor in the lands. The Lord Ordinary suggested another ground of judgment which, if well founded, would be fatal to the appellants' case. His Lordship says: "I do not think that it is possible to spell out of the contract the constitution of a right of servitude, and there is the insuperable difficulty that there is no dominant tenement. It was said that the dominant tenement was the part of the tramway passing through the lands of Scotstoun. That does not appear from the agreement, and, further, the tramway was not made at the time of the agreement, and I imagine that the Whiteinch Company had not even acquired the land on the Scotstoun estate upon which the tramway was to be constructed, because the company was not registered until after the date of the agreement." The reasoning of the learned judge is not to my mind satisfactory. If the language of the agreement be incapable of raising anything beyond a mere personal obligation upon the feuar, it is

(1) 24 R. 1152.

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idle to speculate whether there was or was not a dominant tenement in existence. On the other hand, if the terms of the agreement shew that it was the intention of the feuars to create a right of way over their land whether for a definite period or in perpetuity, in order that it might serve as the means of conveying goods to and from a tenement which, in the contemplation of all, or even some of the parties to the agreement, was to be acquired or constructed, the fact of its not having been so at the date of the agreement could not after it was actually acquired or constructed prevent the right of way from becoming a legal accessory to it, provided that such right of way was so used as to give reasonable notice of the burden to any person in whom the property of the feus might subsequently become vested.

The right which the appellant company assert appears to me to be in the nature of an ordinary servitude of way or passage for vehicles with flanged wheels running upon tramway rails laid for their support, and hauled by horse, and not by locomotive power. That circumstance does not, in my opinion, alter the character of the privilege claimed to any greater extent than would have been effected by giving to the owner of the dominant tenement a right to pave or metal a footpath over the servient land. The "construction" agreement, whatever may be its effect in other respects, does not contemplate that those persons who use the tramway shall have the exclusive use of the land upon which it is laid. It contains a stipulation by the owner and superior of Whiteinch binding the railway company if required to fence the tramway in so far as it passes through his unfeued lands; but in so far as it passes over feued lands the only obligation of the company is to use horse haulage exclusively, and to have the plant and signals of the most modern and best construction, and of such a nature as not to lead to accidents or nuisances.

The privilege claimed by the appellant company belongs, in my opinion, to a class of positive servitudes which are well known to the law; and that is a circumstance of some importance in considering whether such a right has been legally constituted in the present case. It does not admit of dispute that, accord-

ing to the law of Scotland, it is not necessary that servitudes of that class shall rest upon a properly feudalized title. In order to support them it is sufficient that their origin can be traced to a contract or other writing subscribed by the proprietor at the time of the land burdened, and that the writing has been followed by possession and enjoyment on the part of the owner of the dominant tenement, the latter being an indispensable condition in any question with a singular successor of the grantor in the servient land. The law upon this point is accurately stated by Mr. Bell (Principles, s. 979 and following sections). The learned author, in s. 979, states that "servitudes not followed by infeftment which are effectual against singular successors in the servient and available to singular successors in the dominant must be limited to such uses or restraints as are well established and defined leaving others as mere personal agreements," and he adds in a note to the same section: "What shall be deemed servitudes of a regular and definite kind is a secondary question, as to which the only description that can be given generally seems to be that it shall be such a use or restraint as by law or custom is known to be likely and incident to the property in question, and to which the attention of a prudent purchaser will in the circumstances, naturally be called."

I think it necessary to add that, in my opinion, the fact that the contract or writing to which the origin of the privilege is ascribed is conceived in terms which might appropriately be employed in the constitution of a personal obligation is not conclusive against the constitution of a proper burden upon the land if it be matter of reasonable inference from the terms of the document taken as a whole, or from the circumstances of the case, that the constitution of a real servitude was what the parties contemplated. In *Mearns* v. *Massie* (1) the servitude claimed was negative, being non officiendi luminibus, which was an unfavourable circumstance for the alleged dominant owner. The then owner of the servient tenement had bound *himself* by a missive without mention of his successors "never to encroach any further upon the said Thomas Mitchell nor

(1) (Dec. 5, 1800) Hume Dec. 736.

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to build any further towards the north-west anyways to the prejudice of the said Thomas Mitchell, his tenement or lights thereof, except the said four feet of length allowed by him to *me*." The building was erected in conformity with the missive, and had remained in that condition for a long period, when a singular successor of the original builder proposed to erect an addition which was complained of as being an infringement of the servitude. The Court of Session held that a real servitude had been constituted; and according to the report of Baron Hume their Lordships held it to be a settled point "that where an heritor has made an explicit grant of negative servitude it is here sufficient to maintain the right in the ultimate question of 'servitude or not' with a purchaser that the state and condition of the servient tenement has remained all along conformable to, not contradictory of, this written title."

The first article of the "construction" contract stipulates that the first party, Mr. Smith of Jordanhill, shall allow the Whiteinch Railway Company, Limited, to construct and lay at their own expense "a tramway on the lands of Whiteinch, and that from the western boundary of the said lands eastward along unfeued ground till it reaches the western extremity of South Street, and thence with the consent of the said first party and fourth parties (the feuars) along South Street to the eastern extremity of the ground belonging to the said Barclay, Curle and Company, and lying in the south side of said South Street and in the option of the first party and his successors, and when required by them, to continue the said tramway from the said last-mentioned point eastward to the eastern march of the said lands of Whiteinch." It is true that the deed does not make any mention of the successors of the fourth party, the feuars; but it must be noted that each and all of these feuars gives his express consent to the tramway which was to be partly constructed upon his lands being subsequently extended beyond Barclay, Curle & Co.'s feu to the eastern boundary of Whiteinch at the desire of the superior "and his successors." The consent thus given appears to me plainly to imply that it was the intention of each feuar that his lands

should continue to be burdened with the tramway, until at least some successor of the first party had an opportunity of requiring its extension eastward. It is, to my mind, quite inconsistent with the idea that as soon as one or other of the feuars sold the subject of his feu the tramway might be broken up by the purchaser.

I do not think it necessary to notice particularly those heads of the agreement which relate to the mode in which the tramway was to be constructed and worked. The 7th article, which prescribes the purposes for which the tramway when completed was to be used, is of importance. It provides that the tramway "so far as upon the said lands of Whiteinch shall be used solely for the conveyance of traffic to and from the works situated upon the said lands of Whiteinch, and in the lands of Scotstoun, and it shall not be used for the conveyance of traffic to the east of the first party's said lands; neither shall it be connected with any tramway which may be made to the east of the said lands, without the consent in writing of the first party or his successors." The same article empowers the first party to require either the Whiteinch Company or the North British Railway to construct any sidings necessary to connect his unfeued lands with the tramway, and to give his future feuars right to use the branch railway for traffic as above stated, and also to have their traffic carried at the same rates or fares which had been stipulated in the "working" agreement by the feuars who executed the "construction" agreement. In my opinion, the practical effect of these stipulations was that, as soon as the tramway was completed down to its terminus at Barclay, Curle & Co.'s feu, and their railway had been formed connecting the northern terminus of the tramway with the Stobcross section, the Whiteinch Railway Company, as owner of the soil upon which the railway was constructed, became entitled to a servitude of passage over the lands of Whiteinch, whether feued or unfeued, upon which the rails of the tramway were laid. Not only do I think that the superior of Whiteinch obtained a similar servitude of way over the lands of each of his feuars upon which the tramway was constructed, but that each feuar acquired a similar right over the unfeued

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lands of the superior, as well as over the subjects held by his co-feuars, in so far as these were occupied by the tramway. That, according to my apprehension, was not only the object but the effect of the agreement.

The 8th article of the agreement was very lightly dealt with in the argument of the respondents: and in the Courts below, it does not appear to me to have received the consideration which it merited. It makes special and careful provision for the determination of the servitude, the removal of the tramway, and for restoration of the lands and streets which it occupied to their original condition. "In the event of the said tramway ceasing to be used, the first party, or his successors, or their factor, without the consent of the fourth parties, or any of them; and also the fourth parties, with consent of the first party, or his successors, or their factor, shall have full power, and the privilege of constructing the tramway is conferred upon this express condition, to call upon the third party, or their successors, by written requisition addressed to them and sent through the post-office, to lift and remove, within six months of the date of said notice, the said tramway and whole works connected therewith, so far as on the said lands of Whiteinch or streets thereon, or any part thereof, and to restore and leave the said lands and streets, and also the fences, in good order and condition, to the satisfaction of the first party or his successors or factor, and that without being entitled to object to such requisition, or to said removal and restoration, and without having any claim against him or them there-anent."

The stipulations of the 8th article throw a good deal of light upon the nature and extent of the privilege which the respective owners of the soil upon which the tramway was to be constructed intended to confer upon the owners of dominant land who were to be entitled to use it. They are, in my opinion, absolutely incompatible with the theory, either that the tramway was to be destroyed piecemeal as each portion of the servient land came into the possession of a singular successor of the superior or of a feuar who executed the agreement, and equally incompatible with the view that the burden was to be perpetual. The period at which the privilege of way is to

cease and determine is the cessor of its use for the purposes specified in the 7th article; and both the railway companies, one or other of whom would probably have the chief pecuniary interest in the continuance of the privilege, as well as the feuars, have agreed that the ascertainment of such period and the consequent removal of the tramway shall be left to the proprietor and superior of the estate of Whiteinch or his successors, whose determination is to be conclusive.

It is necessary to notice the peculiar terms of the last article of the agreement, because they have been relied on both by the Lord Ordinary and by the learned judges of the First Division as tending to shew that the privilege or burden consented to by the Whiteinch feuars was intended to be purely in the nature of a personal obligation, and was not meant to affect the subjects which they held in feu. The article provides "that the consent of the said first party and also of the fourth party to the formation of said branch tramway and the work and maintenance thereof shall not be held as warranting their respective powers to confer the same, it being distinctly understood that no warrandice and no privilege in perpetuity, notwithstanding anything in the foresaid agreement to the contrary, is given by them respectively, but simply their respective consent thereto, under the conditions aforesaid, and of its removal as aforesaid." These words appear to me to involve a declaration by the proprietor and superior of the estate of Whiteinch and his feuars that they had no intention of granting a privilege or servitude of way which would be perpetual, but not a declaration that they only contemplated a privilege or right of way which would merely affect themselves personally, and would neither affect their lands nor their successors in the lands. On the contrary, the words contemplate that the terms of the agreement may be calculated to raise, and may be founded upon as raising, nothing more than a personal obligation against themselves; and they stipulate that in the event of its being found that the terms of the agreement are insufficient to affect the lands, they and their personal representatives shall not be responsible in law for the consequences; but, whilst stipulating for freedom from that responsibility, the last article reaffirms their consent to the

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construction and maintenance of the tramway upon their lands for a period short of perpetuity upon the conditions expressed in the preceding articles of the agreement.

I have come to the conclusion that a right to conduct cars over land belonging to another for the purposes and for the period specified in the 8th article is not a privilege given in perpetuity, and is a servitude well known to the law of Scotland. I am also of opinion that the terms of the contract were meant to bind, and are effectual to bind, the servient tenement and singular successors, seeing that the tramway was constructed and thereafter continued to be in use until the respondents acquired part of the Whiteinch estate. These successors had precisely the same means of ascertaining the existence and incidents of the burden as they would have had if the right to the servitude had been acquired by prescriptive possession without any other title.

I am therefore of opinion that the interlocutors appealed from ought to be reversed, and the case remitted to the First Division of the Court with directions to assoilzie the appellant company from the conclusions of the summons. The appellants, in my opinion, ought to have their costs of this appeal and their expenses in both Courts below. I therefore concur in the judgment which has been moved by the Lord Chancellor.

LORD MACNAGHTEN. I have had an opportunity of reading and considering the opinion which has just been delivered by my noble and learned friend Lord Watson, and I have only to express my concurrence in it, and in the judgment which has been proposed.

LORD MORRIS. I accept that by the law of Scotland it is sufficient to constitute a servitude such as is claimed in the present case, if it is to be collected or deduced from any writing signed by the proprietor of the land to be burdened when followed by user and enjoyment by the owner of the dominant tenement. The question in this case, consequently, is narrowed to the interpretation of the construction agreement of 1872–1873—namely, Is there thereby created a burden upon the

lands now owned by the respondents binding on them as the singular successors to the said lands with reference to the tramway, under which they are bound to permit the appellants to use it on the lands? This is not a case of an inartificial or informal document, such as letters passing between the parties; it is the case of an elaborate agreement settling the rights of the respective parties which were intended to be clearly expressed; consequently it is not to be interpreted by any a priori reasoning as to what it would or might be reasonable or the opposite to have included in it. Now there is no consent by the fourth parties to the agreement expressed in terms as binding on their successors. That the parties understood the importance of naming their successors expressly when intended to be bound is proved by the use of the word "successors" applied to the parties of the first and third parts respectively when and where they were to be bound in perpetuity. It was said in argument that it becomes necessary to read "successors" as applied to the fourth parties in the 8th article of the agreement which it is contended would be incompatible with a construction of the fourth parties being only personally bound. I fail to see the incompatibility; what was laid down on the lands was a mere tramway—the only expense on the locus in quo was the value of the rails and the cost of the laying down of them. The article provides that the rails are to be taken up and taken away by the company when the tramway ceased to be used. But, my Lords, it appears to me that the draftsman of the agreement intended to and did put the question now raised by the appellant out of dispute. The last article of the agreement dealing with the consent of the first and fourth parties provides as follows: "It being distinctly understood that no warrandice of title *and* no privilege in perpetuity, notwithstanding anything in the foresaid agreement to the contrary, is given by them respectively, but simply their respective consent thereto under the conditions aforesaid and of its removal as aforesaid." I fail to follow the reasoning whereby a privilege in perpetuity is now practically conferred by an agreement which states that it is understood between the parties it is not to be given. I entirely concur in the opinion

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given by the Lord President of the First Division, and I think the interlocutor appealed from should be affirmed.

Ordered, that the interlocutors appealed from be reversed; that the cause be remitted to the First Division of the Court of Session, with directions to assoilzie the appellant company from the conclusions of the summons; and that the respondents pay to the appellants their costs both here and below.

Lords' Journals, June 20, 1898.

Agents for appellants: *Loch & Co., for James Watson, S.S.C., Edinburgh.*

Agents for respondents: *A. & W. Beveridge, for Clark & Macdonald, S.S.C., Edinburgh.*

[PRIVY COUNCIL.]

YOUNG . . . . . DEFENDANT; J. C.*

AND

WALLER . . . . . PLAINTIFF. 1898 March 23; April 29.

AND CROSS-APPEAL.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Civil Service Act, 1884, *ss.* 10, 46—*Abolition of Office—Compensation.*

Although New South Wales "Civil Service Act, 1884" deprives the Crown of its right to dismiss its civil servants summarily without following the procedure prescribed therein, yet it does not take away the right of the Crown to abolish a civil office.

Held, that the holder of an abolished office, unless entitled to a superannuation allowance under the Act of 1884, is not by the true construction of ss. 10 and 46 entitled as for breach of contract to any other compensation. It is at the option of the Government whether he should be offered an equivalent office.

APPEAL and cross-appeal consolidated from a judgment of the Supreme Court upon two demurrers from the defendant's pleas.

The first demurrer raised the questions already decided (1) as to the right of the Crown under the Civil Service Act, 1884 (48 Vict. No. 24), and the retrospective effect of s. 58 of the Public Service Act, 1895. The second demurrer was to the effect that under the Act of 1884 the Government was not entitled by the abolition of the plaintiff's office summarily to dismiss him; that the plea should have alleged that after his services had been dispensed with in consequence of the abolition of his office he had been required by the Government, at the rate of salary last received by him, to perform other duties for which he was considered competent in a public department, and that

* *Present:* LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, and SIR RICHARD COUCH.

(1) See ante, p. 469.

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he refused such change of duty; also that when his services had been dispensed with no other office could be offered to him in any public department.

Darley C.J. on this point said: "What has occurred here is that there has been a dispensing with the services of the plaintiff consequent upon the abolition of office. It is impossible to contend that the Government has not power at will to abolish any particular office. It must, of necessity, be conceded that this power is absolute. It remains then to consider the position of the officer who has filled the office so abolished, and whether the Government have not the absolute right to dispense with his services at pleasure. In my opinion the Government have the absolute power. To hold otherwise would be to hold that once a person was appointed to an office under the Government he had a freehold for life in such office. Whereas the general rule is that he holds during pleasure only. However, the 46th and 49th sections of the 48 Vict. No. 24, when read with the 10th section of the same Act, makes this abundantly clear. The 10th section enables the Government, in the case of the abolition of any office, to require the officer who filled such office to perform any duty for which he is considered competent at the rate of salary last received by him, on the penalty, in case of refusal to serve, of being deprived of any compensation for such loss of office. This provision is clearly one in favour of the Government, who may, but are not bound to, require a continuance of service on the part of the officer. The section, whilst it vests this power in the Government, does not give the officer any right to demand retention in the Government service, or vest in him any cause of action if not so retained. The 46th section then provides that when the services of any officer are dispensed with in consequence of the abolition of office, and no other office can be offered to him at the same salary as provided for by the 10th section or at a salary of not less than four-fifths of the same, he shall be entitled to retire upon the superannuation allowances provided for by the Act. The 49th section then finally provides that when an officer's services are dispensed with in case he is not entitled to superannuation allowances he shall be entitled to a gratuity. Thus

justice is done and hardship prevented. If his services are required he must serve or retire without compensation. If they are not required he becomes entitled to superannuation allowances or to a gratuity according to the circumstances; but I think it clear that he cannot maintain an action against the Government in the nature of an action for a wrongful dismissal when the dispensing with his services arises from the abolition of the office held by him."

Cozens-Hardy, Q.C., and *Corrie Grant*, for the cross-appellant (the point in the principal appeal being the same as at p. 469, ante), contended that under the Act of 1884 the Crown was not entitled to dismiss the plaintiff except for the offences set out in Part III. of the said Act and according to its procedure. No offence there specified was alleged. The mere abolition of his office did not entitle the Crown to dispense with his services under the Act until he had been required to perform some other duty in the manner directed by ss. 10, 46, and 49.

Sir R. Reid, Q.C., and *Vaughan Hawkins*, for the respondent, were not heard.

1898 *April* 29.

The judgment of their Lordships was delivered by

LORD WATSON. The plaintiff in this suit, who is respondent in the leading appeal, obtained employment in the public service of the Government of New South Wales after the passing of the Civil Service Act, 1884. Before the Public Service Act of 1895 was passed, the office which he held was abolished by the Government. After the Act of 1895 became law the suit in which these appeals are taken was brought by the plaintiff against the Government, as represented by the appellant, who had been duly appointed to act as nominal defendant. He claims 7500*l.* as damages for wrongful dismissal and deprivation of office.

By his defence the defendant, who is the leading appellant, pleaded (2.) "that the services and employment of the plaintiff in the declaration mentioned were the services of a person employed in the public service within the meaning of the Act 59 Vict. No. 25, s. 58, and the alleged grievances in the decla-

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ration mentioned were the exercise by the said Government of the right and power of the Crown in the said section mentioned to dispense with the services of any person employed in the said public service, and not otherwise." He pleaded (3.) "that whilst the plaintiff was in the said service and employment the said Government abolished the plaintiff's said office, and thereupon dispensed with the services of the plaintiff as such officer, as in the declaration mentioned, in consequence of the said abolition of his said office under and in accordance with the said Civil Service Act, and the grievances in the declaration mentioned are the said dispensing with the services of the plaintiff in consequence of the said abolition of his office, and not otherwise."

These two pleas were heard, on demurrer, before Darley C.J., with Stephen and Cohen JJ., who, on May 6, 1887, unanimously entered judgment for the plaintiff on his demurrer to the defendant's second plea, and overruled his demurrer to the defendant's third plea, with costs.

The opinion of the Court was delivered by Darley C.J., with the concurrence of the two learned judges who sat with him. Their judgment upon the demurrer to the second plea was rested, without discussion, upon the decision of the Supreme Court in the case of *Adams* v. *Young*. In that case, however, the plaintiff's office was not abolished, and the loss of which he complained was solely due to his summary dismissal by the Government. In this case, the plaintiff's loss of his office and its emoluments has not been due to his summary dismissal, but to the abolition by the Government of the office which he held. Now, although it was decided by this Board in *Gould* v. *Stuart* (1) that the effect of the Civil Service Act, 1884, was to deprive the Crown of its right to dismiss its civil servants summarily, without following the procedure prescribed by the Act, it was certainly not suggested that the provisions of the Act do, either directly or by implication, take away the right of the Crown to abolish a civil office. In the argument addressed to us for the plaintiff it was not disputed that the Crown's power of abolition is recognised by the Act of 1884,

(1) [1896] A. C. 575.

which makes special provision, in the event of its exercise, for the compensation to be made to the civil servant who is thereby deprived of his office and its emoluments. The substance of the defendant's third plea, to which the plaintiff demurs, is that the plaintiff is not entitled to any compensation under the Act of 1884. If that can be shewn, it follows that the plaintiff has no title to insist on his claim of damages at common law as for breach of contract.

There are only two clauses in the Act of 1884 which bear upon this question. Sect. 10 provides: "If the services of any officer be dispensed with in consequence of the abolition of his office, or of any departmental change, and not from any fault on his part, such officer may be required, at the rate of salary last received by him, to perform any duty for which he is considered competent in any public department, and should he refuse such change of duty he shall not be entitled to receive any compensation." Sect. 46 enacts: "When the services of any officer are dispensed with in consequence of the abolition of his office, and no office can be offered to him at the same salary as hereinbefore provided, or at a salary of not less than five-sixths of the same, he shall be entitled to retire upon the superannuation allowance hereinafter provided."

It was admitted in the argument for the plaintiff that at the date when his office was abolished he had not been a civil servant for such a period of time as would entitle him to a superannuation allowance. He therefore rested his claim for damages or compensation upon the failure of the Government to fulfil their statutory obligation by offering him employment as a civil servant in some public department at the rate of salary received by him before the abolition of his office, or at a salary of not less than five-sixths of the same.

The argument of the plaintiff was rested entirely upon the contention that, by ss. 10 and 46 of the Civil Service Act, 1884, an imperative duty is imposed upon the Government of the Colony, in the event of their abolishing a civil office, to make compensation to the holder of it by offering to him an office in some public department at the same salary which he had received before the abolition, or at a salary not less than five-

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sixths of the same. For that contention, in their Lordships' opinion, there is no warrant to be found in the language of the Act, which places it entirely within the option of the Government to re-engage the civil servant whose office has been abolished, or not, as they shall see fit. Sect. 10 merely provides that the displaced official may be required to perform any duty for which he is considered competent in any public department at the rate of salary last received by him; and the penalty of his declining to accept the duty when required is that he shall not be entitled to any compensation. But it is clear that all questions relating to his competency, and to the propriety of requiring him to accept another situation, are left to the discretion of the Government.

In like manner, s. 46 enacts that a civil servant, displaced by the abolition of his office, shall be entitled "to retire upon the superannuation allowance hereinafter provided," if no other office can be offered to him at the same salary as hereinbefore provided, or at a salary of not less than five-sixths of the same. These enactments, in so far as they relate to the offer of another office, refer back to the provisions of s. 10, and leave the right of judging whether such an offer ought to be made to the Government.

Their Lordships will therefore humbly advise Her Majesty to dismiss both the original and the cross appeals. The parties will each bear their own costs.

Solicitors for Waller: *Hemsley & Hemsley.*
Solicitors for Young: *Light & Galbraith.*

[PRIVY COUNCIL.]

FOX AND OTHERS . . . . . DEFENDANTS;

AND

THE GOVERNMENT OF NEWFOUNDLAND . . . . . PLAINTIFFS.

J. C.*
1898
May 4, 26.

ON APPEAL FROM THE SUPREME COURT OF NEWFOUNDLAND.

Law of Newfoundland—58 Vict. c. 3—Priority of Crown Debts—Debts due to Boards of Education—Education Acts of 1892 and 1893.

Newfoundland Act 58 Vict. c. 3, passed for the winding-up and liquidation of a bank, provided that priority be given to all debts and claims due to the Crown or to the Government or revenues of the Colony:—

Held, that balances in the books of the bank to the credit of the various boards of education in the Colony were not such debts and claims as aforesaid. It appeared that the boards were not constituted by the Education Acts of 1892 and 1893 mere agents of the Government, but had a discretionary power, independent of the Government, in expending such balances.

APPEAL from a judgment of the Supreme Court (May 5, 1896), which reversed a judgment of Winter J. (Oct. 24, 1895), and held the respondents to be preferential creditors of the Commercial Bank in respect of certain items being amounts standing to the credit of the education boards and districts in the Colony.

The facts, proceedings, and sections of 58 Vict. c. 3 in question are sufficiently set out in the judgment of their Lordships.

Cozens-Hardy, Q.C., and *W. H. Cozens-Hardy*, for the appellants, contended that, having regard to the provisions of Education Act, 1892, and the Higher Education Act, 1893, the balances due by the bank in liquidation to the various education boards were not debts due to the Crown or to the Government of the Colony within the meaning of s. 35 of Consolidated Statutes (2nd series), c. 83, entitled "Of Insolvency" (formerly

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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s. 34 of the Consolidated Statutes, c. 90). When once these moneys had been paid to the credit of the various boards they passed out of the control of the Government, and were absolutely at the disposal of the respective boards for the purposes of the Education Acts. The boards were not branches or departments, or in any way agents of Government.

Asquith, *Q.C.*, and *Gore Browne*, for the respondents, contended that the balances in question were part of the public funds of the Colony. They were received by the bank for the service of the Colony. Not having been applied thereto, they were at the date of liquidation part of the public funds due to the Crown by the bank within the meaning of s. 35. The boards or persons in whose names the balances stood had in themselves no right or title thereto; they held them as agents of the Government for the safe custody, control, and expenditure thereof. Reference was made to *In re West London Commercial Bank*. (1)

Cozens-Hardy, *Q.C.*, replied.

1898 May 26.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The Commercial Bank of Newfoundland suspended payment on December 10, 1894, and on January 7, 1895, an Act of the Newfoundland Legislature (58 Vict. c. 3) was passed for its winding-up and liquidation. The appellants are the trustees appointed for that purpose. By s. 2 of the Act the provisions of chapter 90 of the Consolidated Statutes of Newfoundland entitled "Of Insolvency" were made applicable to the winding-up of the bank in the same manner as they applied to individuals and partnerships. Of these s. 34 provided that next after preferential payments provided for in the preceding sections all debts and claims due to the Crown or to the Government or revenues of the Colony should form a prior claim upon the estate and effects of any person declared insolvent. On October 18, 1895, the respondents took out a summons against the appellants claiming to be paid preferentially out of the assets of the bank an aggregate sum of $10,233.06, being the amount of the sums due by the

(1) (1888) 38 Ch. D. 364.

bank to the Government upon the accounts set out in the particulars annexed to the summons. These sums were the balances standing in the books of the bank at the time of its insolvency to the credit of the current accounts which had been opened and were kept in the bank by and in the names of the chairmen of various boards of education in the Colony appointed under the provisions of the local "Education Act, 1892." The way in which the money was paid to the bank and receipt given was stated by a witness who was a clerk in the Treasury Department of the Government to be in accordance with a practice which had existed for many years. Under this practice, at the end of each quarter a list is made up of the amounts to be paid to the bank on account of the various parties named in the list; the clerk of the bank comes to the Treasury, and, if the warrants for the quarter have come down, the list is made up and revised, and the gross amount paid to the clerk of the bank in one cheque. The list contains the amounts appropriated or allocated to the several boards of education, Church of England, Methodist, &c., and also contains salaries and other items not now in question. The bank receives the moneys for and on behalf of the several parties in whose favour the warrants are drawn and gives a receipt on their behalf. The warrants are drawn in favour of the several boards of education. After the payment the Treasury has no further knowledge or cognisance of the condition of the accounts of the several parties in or with the bank. By s. 1 of the "Education Act, 1892," it is enacted that there shall be annually appropriated for general educational purposes $8736.80 to be apportioned among the several religious denominations of the Colony according to population, to be expended by the several boards of education appointed in the several districts provided for in the Act, subject to certain deductions as provided for in other sections. Sect. 2 enacts that a further sum of $5,526.39 shall be annually appropriated and apportioned among the several religious denominations of the Colony, subject to deductions provided for in other sections, and expended, in such manner as the Governor in Council may determine, in furtherance of education in places outside the

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city of St. John's in any of the districts where there are not means adequate for the support of schools. Other sections of the Act following these and relating to other moneys appropriated for educational purposes make the same distinction between expending by boards of education and expending by the Governor in Council. By s. 17 the Governor in Council is to appoint in each of the Church of England districts members of the Church of England, one of whom shall be the senior clergyman of that Church actually resident or officiating in the district, to form and be a Church of England board of education for the district. And the section says that "The said boards shall manage and expend all moneys hereby appropriated for Church of England general educational purposes in the respective districts." Sects. 23 and 28 contain similar provisions for the Roman Catholic and Methodist districts. Sect. 36 gives power to the boards to make by-laws, rules, and regulations, not contrary to the provisions of the Act, for the establishment and management of schools within their respective districts, and for the appropriation of the respective sums of money therein or thereafter to be granted for the districts, and provides that all by-laws, rules, and regulations shall be submitted by the boards to the Governor in Council for approval, and shall be of no effect until such approval has been received. Sect. 37 provides that there shall be an annual meeting of every board of education when the accounts shall be submitted and audited, and the chairman of the board shall, as soon thereafter as possible, transmit to the proper superintendent correct returns of all schools under the board with detailed accounts duly audited according to the forms prescribed in schedules to the Act, and any board neglecting to transmit the return on or before the first day of September in each year shall, on the representation of the proper superintendent, not receive further payments until such default shall be remedied. Sect. 71 provides for the appointment of three superintendents who are by s. 72 to have, subject to the Governor in Council, a general supervision and direction of all schools receiving aid from Government, and are to enforce the provisions of the Act and the regulations and decisions of the Governor in Council in

reference to the same, and to prepare annually a report and detailed accounts of income and expenditure, which shall be laid before the Legislature. In 1893 an Act, 56 Vict. c. 7, was passed to provide for higher education under which a board of twenty-three members called "The Council of Higher Education" is to be appointed by the Governor in Council and a sum of $4000 is to be paid to the Council, to be expended by it in prizes, premiums, and scholarships. This council is in the list of the sums to be received by the bank.

The case was first heard by Winter J., who, as to six items which are not now in question, allowed the claim as preferential, and as to the amounts standing to the credit of the education boards and the council of higher education held that it was not preferential. This judgment was ordered by the Supreme Court to be reviewed, and on the matter coming in review before a full bench, consisting of the Chief Justice and Little and Winter JJ., the former two held that the Government were preferential creditors of the bank on all the amounts set out in the particulars annexed to the summons, Winter J. dissenting. Judgment was accordingly given for the Government with costs, and the trustees have brought the present appeal.

The several amounts of money specified in the list were, in their Lordships' opinion, paid by the Treasury to the bank and received by it as the agent of, and on behalf of, the several boards of education. The bank did not become a debtor to the Government for those sums or retain them for the Government. The warrants were drawn in favour of the boards and a receipt given on their behalf, and the bank became a debtor to them, the money being placed to their account in the books of the bank. The Government had no longer any control over the money. It was contended by Mr. Asquith, who appeared for the Government before their Lordships, that the boards of education were merely distributing agents of the Government, only distributing branches. This appears to be the view of the majority of the learned judges, as expressed in the reasons they have given for their judgment, and indeed is the only way in which the judgment can be supported. But this view is not consistent with the provisions in the Act. In ss. 1 and 2 a

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distinction is made between money to be expended by a board of education and money to be expended as the Governor in Council may determine. By s. 34 the boards have power to make by-laws and rules to be approved by the Governor in Council, but are not bound to do so. By s. 37 their accounts are to be audited, and returns of all schools with detailed accounts duly audited are to be transmitted to the superintendent, and these are by s. 72 to be laid before the Legislature. This seems to be for the information of the Government and Legislature, and not in order that any item of expenditure may be disallowed if the Government does not approve of it. The appointment of boards for each of the three religious denominations, and the constitution of the board, indicate that it is not to be a mere agent of the Government for the distribution of the money, but is to have within the limit of general educational purposes a discretionary power in expending it—a power which is independent of the Government. And in the form of engagement of a teacher, given in Sched. F of the Act, the chairman agrees on behalf of the board to pay the salary of the teacher, and if it be not paid the board may be sued. This is not consistent with a mere agency to distribute the money. According to the language of the Insolvency Act, the question is whether the sums in the list annexed to the summons are debts or claims due to the Crown or to the Government or revenues of the Colony, and their Lordships are of opinion that they are not. They will, therefore, humbly advise Her Majesty so to declare, and to reverse the judgment of the Supreme Court, except so far as it relates to the six items before mentioned, and to order the respondents to pay the costs of the hearing before the Full Bench. The respondents will also pay the costs of this appeal.

Solicitors for appellants: *Godden, Son, & Holme.*
Solicitors for respondents: *Burn & Berridge.*

[PRIVY COUNCIL.]

In re PARSONS' PATENT.

J. C.*
1898
April 19;
May 14.

Patent—Five Years' Prolongation—Inadequate Remuneration.

Where an invention was of conspicuous merit, and it appeared that as regards its application to one of its purposes the patentee had received for an exclusive licence to use it certain shares in companies formed for that purpose, the value of which shares was largely dependent on the prolongation of the patent, and that with respect to its application to all other purposes the patentee, who had done his best to push his invention, had received nothing at all if the accounts were made up on the basis of a reasonable allowance to himself for his services in working his patents:—

Held, that the patentee, who had fairly kept and presented his accounts, should be allowed a five years' prolongation.

THE petition stated that Charles A. Parsons obtained on April 23, 1884, a patent for an invention of "improvements in rotary motors actuated by elastic fluid pressure and applicable also as pumps"; that the invention related to steam turbines; that no steam turbine had prior to his patent been in practical use within the realm; that the petitioner was the first to produce a practical steam turbine and to lay down the conditions essential to its successful working. In order to do this the petitioner had to practically and theoretically work out the proper relations between the velocity of the moving parts, and the velocity of the issuing steam acting upon them, and by a system of alternate rows of fixed and moving blades he was the first to devise a working machine and to proportion the parts of the machine so as to produce a practical working turbine. The high speed at which in order to obtain the best results it was necessary to run the moving parts rendered it essential that bearings of a novel description should be invented, the bearings being provided with a certain amount of elasticity so that the moving parts could rotate around their centre of gravity or principal axis, instead of around their

* *Present:* LORD WATSON, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

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geometrical centre or axis, so as to prevent the vibration and shaking which would otherwise have rendered the machine useless. The petitioner also by introducing the steam into the middle of his turbine, and causing the steam to travel in opposite directions through two series of fixed and moving blades was able to eliminate one of the great difficulties attaching to steam turbines known as the thrust, namely, the pressure upon the moving parts in the direction of the axis of rotation of the moving parts caused by the pressure of the steam against those moving parts.

The petition then described the difficulties and opposition encountered in pushing the invention, and the extent to which the petitioner had been remunerated, and submitted that the amount received by him and all others interested in the patent was wholly inadequate and entirely out of proportion to the value of the invention; that he had invented and put before the world a new and most valuable form of engine, and by a large expenditure of capital and persistent efforts during the whole term of the patent had, when the patent was about to expire, established his engine as a commercial article; and that a further extension of his patent for the term of fourteen years should be granted to enable him to reap the fruits of his invention.

Moulton, Q.C., and *Walter*, for the petitioner, claimed for the invention that it was an alternative form of steam-engine capable of ranking in point of merit with the first practical steam-engine. Having regard to its conspicuous merit, no sufficient remuneration had been received. Excluding the question of marine propulsion, there had been practically no remuneration at all. The petitioner was entitled to a substantial prolongation, notwithstanding the fact that the company which had been formed and was about to commence operations would participate in any profits which might be derived hereafter.

The Attorney-General (*Sir R. Webster*) and *Sutton*, for the Crown, contended that the moneys already received by the petitioner, and the shares which had been allotted to him in

the company, together with the royalties to which he would be entitled, afforded ample remuneration.

1898. May 14. The reasons of their Lordships were delivered by

LORD MACNAGHTEN. On April 19 last their Lordships had under their consideration an application by Mr. Charles Algernon Parsons for an extension of his patent numbered 6735, and dated April 23, 1884, for "improvements in rotary motors actuated by elastic fluid pressure and applicable also as pumps."

The invention which is the subject of the patent is one of conspicuous merit. It has solved a problem which for a hundred years and more has exercised and baffled the ingenuity of inventors. Many persons have endeavoured to employ the velocity of steam for the purpose of causing rotary motion without the intervention of any reciprocating apparatus. But no one before Mr. Parsons ever succeeded in producing a steam turbine of practical utility. Mr. Parsons had his attention directed to the subject while he was a student at Cambridge, and he devoted much time and thought to it then. But it was only after prolonged research and many experiments that he was able to determine the conditions of success.

Mr. Parsons states in his specification that motors according to his invention are applicable to a variety of purposes. Practically, however, up to the present time they have been applied only to the two purposes of electric lighting and marine propulsion. For the purpose of electric lighting the invention seems to be specially adapted. In dispensing with reciprocating action Mr. Parsons gets rid of vibration. It thus becomes possible to establish electrical stations in populous places, and to use the most powerful engines there without fear of being stopped by an injunction on the ground of nuisance. As regards marine propulsion only one vessel so far has been equipped with Mr. Parsons' invention. The success of that experiment, however, has (as their Lordships were informed) induced the Admiralty to order two vessels of a similar type, one of which is guaranteed to attain the speed of thirty-five knots per hour. Lord Kelvin when examined as a witness expressed his

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opinion that there is a great future for steam turbines, and that for some purposes Mr. Parsons' invention is likely to supersede the reciprocating type of engines.

So far the case is clear. The difficulty begins when the question of remuneration comes to be considered. It would not be easy under any circumstances to appraise the value of such an invention or to assess even approximately the amount of remuneration which it deserves. The task is not rendered lighter by the circumstance that it is impossible to measure with anything like accuracy "the profits made by the patentee as such." If the invention had been less meritorious their Lordships would have been disposed to consider that circumstance fatal to the application, as it certainly would have been if the difficulty had been attributable to any fault on the part of the patentee. But their Lordships are satisfied that the patentee's accounts have been fairly kept and fairly presented, and that Mr. Parsons has given their Lordships all the assistance in his power.

It will be convenient in the first place to deal with the profits of the invention derived from its application to purposes other than those of marine propulsion.

The general account of receipts and expenditure in respect of the English patent exclusive of its application to the purpose of marine propulsion brings out a result shewing that the total expenditure has exceeded the gross profits by the sum of 1107*l.* 13*s.* 10*d.*, after allowing interest on capital at the rate of 7 per cent. per annum, but without charging anything for the patentee's services.

In regard to foreign patents corresponding to the English Patent No. 6735/84 the patentee's accounts bring out a loss of 202*l.* 4*s.* 11*d.* The Belgian, German, Italian, and Swedish patents were allowed to lapse in the interval between July, 1890, and December, 1893, when Mr. Parsons' patent rights were in the hands of his late partners, from whom they were repurchased in December, 1893, in consideration of the sum of 1500*l.* In September, 1895, Mr. Parsons sold to the Westinghouse Machine Company of Pittsburg the United States and Canadian patents, together with other valuable patent rights

belonging to him, but reserving the right to use all the patents comprised in the sale for the purpose of marine propulsion. The consideration was a lump sum of 5000*l.* and certain royalties, in respect of which the sum of 850*l.* has been received. The total amount received from the sale after deducting expenses was the sum of 5263*l.* 18*s.* 8*d.*, of which one-fifth is attributed in the accounts to the Patent No. 6735/84. Even if the whole proceeds of the sale were attributed to the original patent it appears to their Lordships that the gain on the foreign patents would not counterbalance the loss on the English patent if any reasonable allowance is to be made to the patentee for his services.

The result so far in a pecuniary point of view is disappointing. Their Lordships, however, are satisfied that Mr. Parsons has done his best to push his invention. Its slow progress in public favour is in accordance with all experience. New methods are not welcomed by workmen or manufacturers, or even by mechanical engineers. The greater the novelty the greater the apathy and hostility to be overcome.

The circumstances relating to the application of the patent to the purpose of marine propulsion and the results in the shape of profits attributable to that application require a more detailed statement.

In the year 1893 Mr. Parsons made numerous experiments in order to test the applicability of steam turbines for the purpose of marine propulsion. In January, 1894, he granted to a company called the Marine Steam Turbine Company, Limited, an exclusive licence to use for the purpose of marine propulsion, and for that purpose only, the Patent No. 6735/84, together with a large number of other patents belonging to him, some of which were improvements more or less important, and some independent patents. In consideration for this licence he received 9000*l.* in fully paid-up shares in the company, which had an issued capital of 24,000*l.* out of a nominal capital of 25,000*l.*; so that Mr. Parsons became interested in three-eighths of the issued capital of the company.

In order to demonstrate the effect of steam turbines as applied to the purpose of marine propulsion, the company built

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and equipped the *Turbinia* at a cost of about 16,000*l.* Mr. Parsons executed all the work for the company at net cost, and without making any charge for his own services.

When the success of the *Turbinia* was established, a new company called Parsons' Marine Steam Turbine Company, Limited, with a nominal capital of 500,000*l.*, divided into 5000 shares of the nominal value of 100*l.* each, was formed for the purpose of purchasing from the old company the licence which they held from Mr. Parsons, together with the *Turbinia* and all the tools and effects of the company. The purchase price was 30,000*l.* in cash and 80,000*l.* in shares, together with certain royalties and certain rights to further shares in the event of further issues of capital. After repayment of the outlay on the *Turbinia*, the sum received in cash by Mr. Parsons in respect of his shares in the old company does not seem to have been more than sufficient to pay him a fair remuneration for his services in connection with the *Turbinia*.

The result appears to be that the remuneration which Mr. Parsons has received for his invention consists of so much of his interest in the new company, and so much of his remaining interest in the old company as may be properly attributable to the Patent No. 6735/84.

As regards Mr. Parsons' interest in the old company, he is entitled to certain royalties which no doubt may prove extremely valuable, but from which no profit has hitherto been derived.

His shares in the new company, 300 in all, reduced in number by a few shares given by him to his employees, are admittedly of considerable value. Shares in the company are not on the market, and have never been sold. Their Lordships, however, think they ought to be taken at their par value.

The question then arises how much of Mr. Parsons' interest in the old company and in the new company is properly attributable to the Patent No. 6735/84. That is a very difficult question. But, having regard to all the circumstances, and having considered the evidence of the gentleman who assessed the value of the patents comprised in the sale to the new company for the purpose of apportioning the price between them, their Lordships have come to the conclusion that the amount

should be taken at not more than one-half and not less than one-fourth.

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Having arrived at this conclusion, considering the position of the new company, bearing in mind that it cannot commence operations at the earliest before August next, and that the value of the shares in the new company must depend to a large extent on the prolongation of the original patent, and weighing all the other circumstances of the case, their Lordships are of opinion that Mr. Parsons has not been adequately remunerated; and they will consequently make their report to that effect. They have already intimated that the patent should be prolonged for five years.

Solicitors for petitioner: *Crossman, Prichard, Crossman & Block.*

Solicitor for Crown: *Solicitor to the Treasury.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR NEW SOUTH WALES . . . . . } PLAINTIFF.

AND

EMILY SUSANNAH LOVE . . . . DEFENDANT.

J. C.* 1897 *June* 2. 1898 *May* 14.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Nullum Tempus Act (9 *Geo.* 3, *c.* 16) *applies to the Colony—*9 *Geo.* 4, *c.* 83.

Held, that the Imperial Nullum Tempus Act (9 Geo. 3, c. 16) is in force in New South Wales; and that it applies to lands which have never been dealt with by the Crown.

9 Geo. 4, c. 83, primâ facie on its true construction applies that Act to the Colony. Its operation to that effect cannot be restricted by confining the laws and statutes thereby applied to those relating to procedure; or by shewing that a specific exception in the applied Act preserving the Crown's right could not operate in the circumstances of the Colony.

APPEAL from a judgment of the Supreme Court (Feb. 18, 1896), overruling a demurrer to the respondent's plea to an

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD MORRIS, and MR. WAY.

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information of intrusion to recover certain lands in the Colony.

The information filed on March 14, 1895, alleged that the lands in suit were and had ever since the original settlement of the territory of New South Wales been waste lands belonging to and vested in the Crown, and had never been alienated or been the subject of any grant, dedication, demise, licence, or contract by Her Majesty or her predecessors, and ought to be in Her Majesty's possession, and prayed relief accordingly.

The respondent by his plea, dated April 10, 1895, averred that one Keith, more than sixty years before the filing of the information, entered on and thenceforward held possession of the lands as his own property; that he conveyed his interest therein to William Love, who settled the same in trust for himself and his wife Susannah Love, and the survivor of them, for life, and after the decease of the survivor, on the respondent absolutely; that the foregoing persons had from the entry of Keith to the present time held continuous possession of the lands adversely to Her Majesty and without payment of rent to her, and had themselves since the said entry taken and enjoyed the rents, revenues, issues, and profits of the land, and that Her Majesty's title to the land did not first accrue within sixty years next before the filing of the information. The plea did not aver that the lands had not been in charge of the Crown within the said sixty years.

On May 20, 1895, the appellant replied, traversing the allegations of the plea, and also demurred thereto on the grounds (1.) that the Act 9 Geo. 3, c. 16, is not in force in New South Wales; (2.) that assuming it to be in force it does not apply to lands which have never been dealt with by the Crown; (3.) that the sixty years was not alleged to have run out before the date of the Constitution Act, 1855; (4.) that the plea shewed no title in the respondent.

The Supreme Court, in overruling the demurrer, pointed out that the Act in question had always been assumed to be in force since 1849, when it was judicially assumed that adverse possession for sixty years would oust the Crown. They proceeded: "Seeing, then, that since 1849 this statute has been

deemed applicable to the circumstances of the Colony, it appears to us that it would be very dangerous now to hold that an Act of so remedial a nature, passed, as its preamble shews, 'to answer the good end and purpose of securing the general quiet of the subject against all pretences of concealment whatsoever,' should now at the close of the year 1895 be for the first time held inapplicable to the administration of justice in the Colony. Certainly the prevailing opinion of the profession for many years, doubtless founded on the language of the Court in various cases, has been that the Act is in force in this Colony.

"The effect of such an opinion upon transactions by persons dealing in land must be obvious. In 1861 the Nullum Tempus Act was amended in England by 24 & 25 Vict. c. 62, which recited that the 'good purpose of the Act' had not been fully attained by reason of the exception so much relied upon in this case as to lands being in charge or standing in super of record, and thereupon this exception was wholly got rid of.

"It is well known that in many of the earlier grants issued by the Crown in this Colony the description of the lands intended to be granted is indefinite and vague in the extreme—so much so that it is now nearly impossible to ascertain from the description in the grant to what land it applies. Sometimes the grant was of so many acres, to be known as such or such a farm, and nothing more. In such a case the present holder is not able to shew a documentary title to the land, and has to rely upon possession only. Many of these grants were within what is now known as the city of Sydney, and are now covered with streets and houses: see *Doe* d. *Devine* v. *Wilson*. (1) If, then, this Act did not now apply, we fear that 'the general quiet of the subject' would not be secured, but that his quiet would depend in many cases upon the temper of the Government of the day. We feel convinced that there are hundreds of titles which, so far as the Crown is concerned, depend on this statute. If it were once supposed that the Crown had the power of putting any person who, or whose predecessors, had been in possession for sixty years to the proof of his documentary

(1) (1855) 10 Moo. P. C. 502.

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title, this would cause so much doubt and confusion in the transfer of property that we believe in many instances the value of certain properties would be deteriorated, and in some instances be rendered practically unmarketable. We entertain no doubt as to the Act being in force."

Cohen, Q.C., *Vaughan Hawkins*, and *Butterworth*, for the appellant, contended that the Crown was entitled by its prerogative to all lands in the Colony which had never been granted by the Crown, and that its right thereto cannot be barred by adverse possession or any lapse of time in the absence of express statutory provision. Reference was made to *Théberge* v. *Laudry* (1); *Cushing* v. *Dupuy*. (2) This prerogative was taken away to a certain and very limited extent in England and Wales by the Nullum Tempus Act (9 Geo. 3, c. 16). The Court below did not hold that that Act was part of the law which the first settlers in the Colony in 1788 brought with them, but that it was made applicable by s. 24 of 9 Geo. 4, c. 83. *Whicker* v. *Hume* (3) decided that that section referred not to laws generally, but only to laws as to modes of procedure. But the Nullum Tempus Act does not merely deal with procedure: it in effect transfers title from the Crown to a subject. See also *Attorney-General* v. *Stewart*. (4) Sect. 24 does not shew any intention to affect the Crown or oust it of its prerogative. The Nullum Tempus Act is not suited to the Colony; it grew out of circumstances peculiar to English history. It continued 21 Jac. 1, c. 2. The object of those Acts was to protect the subject against "pretences of concealment" growing out of the circumstances subsequent to the suppression of monasteries, where lands forfeited to the Crown never came to the Crown, but were by secret devices transferred elsewhere. In the Colony the evil was not that of "concealers" attacking the title of the subject, but that of squatters evading the authority of the Crown. Neither of those Acts affected the possessions of the Crown generally, or enabled mere possession to prevail against the Crown's title. 24 & 25 Vict. c. 62, was the first

(1) (1876) 2 App. Cas. 102.
(2) (1880) 5 App. Cas. 409, 419.
(3) (1858) 7 H. L. 124.
(4) (1817) 2 Mer. 143.

Act which subjected the Crown in England to a law of limitation similar to that between subject and subject. Reference was made to *Attorney-General for British Honduras* v. *Bristowe* (1), to the admission of counsel therein, and the assumption in the judgment that sixty years' adverse possession barred the Crown. As to the reconsideration of a point decided, see *Reg.* v. *Hughes.* (2) Reference was also made to *Mayor of Hull* v. *Horner.* (3) Further, on the assumption that the Nullum Tempus Act applied, there had been local legislation inconsistent therewith which had the effect of repealing it. See Crown Lands Acts of 1842, 1861, and 1884, namely, 5 & 6 Vict. c. 36, 25 Vict. No. 1, and 48 Vict. No. 18. It was contended that it would be inconsistent with the provisions of those Acts that a process should have been at work as from the commencement of the Colony giving to unlawful occupiers for sixty years absolute titles against the Crown free from all reservations and conditions. Lastly, the exception in the Acts in favour of the Crown of lands "duly in charge or standing in super of record" within sixty years is an essential part thereof, and is inapplicable to the Colony. Nothing similar to the revenue system and records of the Court of Exchequer exists or could have existed in the Colony. There is no record or survey of ungranted lands. Whatever is ungranted belongs to the Crown. As for receipt of revenue, the lands originally had no pecuniary value.

The respondent did not appear.

1898 *May* 14.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. This is an appeal by the Attorney-General for New South Wales against the judgment of the Supreme Court of the Colony pronounced on February 18, 1896, overruling a demurrer to the defendant's plea to an information of intrusion to recover certain lands in the parish of Concord and county of Cumberland in the said Colony. The question involved is whether the English Nullum Tempus Act (9 Geo. 3, c. 16) is in force in the Colony, and applies to

(1) (1880) 6 App. Cas. 143. (2) (1865) L. R. 1 P. C. 81, 92.
(3) (1774) 1 Cowp. 102, 215.

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land which has never been granted out or dealt with by the Crown.

It does not appear to be denied that the lands in question (described by their abuttals and containing 13¼ acres) were and had ever since the original settlement of the territory of New South Wales been waste lands belonging to and vested in the Crown.

The defendant, by his plea dated April 10, 1895, averred that one Edward J. Keith, more than sixty years before the filing of the information, entered on and thenceforward held possession of the lands as his own property, that he conveyed his interest therein to William Love, who settled the same in trust for himself and his wife Susannah Love, and the survivor of them for life, and after the decease of the survivor on the defendant Emily Susannah Love absolutely; that the foregoing persons had from the entry of Edward J. Keith to the present time held continuous possession of the lands adversely to Her Majesty, and without payment of rent to her, and had themselves since the said entry taken and enjoyed the rents, revenues, issues, and profits of the land, and that Her Majesty's title to the land did not first accrue within sixty years next before the filing of the information. The plea did not aver that the lands had not been in charge of the Crown within the said sixty years.

On May 20, 1895, the applicant replied, traversing the allegations of the plea, and also demurred thereto on the grounds (1.) that the Act 9 Geo. 3, c. 16, is not in force in New South Wales; (2.) that, assuming it to be in force, it does not apply to lands which have never been dealt with by the Crown; (3.) that the period of sixty years was not alleged to have run out before the date of the Constitution Act, 1855; (4.) that the plea shewed no title in the defendant.

Joinder in demurrer having been delivered, the demurrer came on for hearing before the Full Court (consisting of Darley C.J. and Windeyer and Simpson JJ.), by whom judgment was pronounced on February 18, 1896, in favour of the defendant overruling the demurrer, Simpson J. stating that he felt very considerable doubt about the matter.

Their Lordships have no doubt that the judgment accurately describes the importance of the question here raised to the Colony. The learned judges say "the earlier grants issued by the Crown were vague in the extreme, and that it would be in the present day impossible to ascertain from the description in the grants to what lands they applied." And it is clear that the inference which the learned judges draw from that state of facts is accurate, "that the holders would not be able to shew upon the face of the instrument a title, and have to rely upon possession."

Their Lordships do not think that the learned judges at all exaggerate the mischief and confusion which would arise in the transfer of property if the holders could not depend upon the operation of the statute in question.

Two arguments appear to have been suggested against the application of the Act to the particular Colony under 9 Geo. 4, c. 83, which primâ facie applied the Nullum Tempus Act to the Colony in question as much as if it had in terms re-enacted it for that Colony.

Sect. 24 of that Act provides "that all laws and statutes in force within the realm of England at the passing of this Act" (that is to say, in the year 1828) "shall be applied in the administration of justice in the courts of New South Wales," and it is sought by construction to limit the words "all laws and statutes" by introducing into the section the words "having relation to procedure" or some equivalent expression. At least that is the only intelligible mode in which the argument can be supported, because the words which do occur in the section—"in the administration of justice"—would certainly include a limitation of the time within which actions can be brought, and their Lordships are of opinion that the language of the section cannot be limited so as to exclude the statute, which for the reasons pointed out by the learned judges were and are so important in the administration of justice in the Colony.

The second argument is not very intelligible, since the words upon which reliance is placed are words which in the statute thus applied (9 Geo. 3, c. 16) except from the operation of the statute lands in respect of which the Crown has been answered

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by rents, revenues, issues, or profits thereof within the space of sixty years next before the issuing or commencing of such action, information, &c., as shall at any times have been duly in charge or stood in super of record within the space of sixty years.

The provision is intelligible enough, and what in substance it means is that if the Crown is not actually in possession, but that in the Crown's accounts some person is charged with the rent which they had not paid and still stand as a Crown debtor in the Crown books, and that condition of things has existed within the sixty years, the title by that condition of things, although the possession may have been for sixty years, was not adverse, because during that period something was payable to the Crown which had not been paid.

It is not suggested here that the person in possession filled that character; but the argument appears to be that, because there is no such administration in the Colony as involves the peculiar form of Crown accounting thus described, the remedial operation of the statute cannot apply.

Their Lordships are unable to accept any such suggestion. There is no allegation here of any equivalent record against the person who held possession for sixty years, and if no modification or limitation, such as s. 24 of the Act authorizes, has been made so as to apply such a mode of accounting to the Crown as might have an equivalent effect, the only result would be that there is nothing upon which the exception preserving the Crown's right could operate, but certainly would not cut down the enacting part of the statute, or establish that it was inconsistent with the laws of England.

For these reasons, their Lordships are of opinion that the judgment of the Supreme Court was right, and they will humbly advise Her Majesty that this appeal should be dismissed accordingly.

Solicitors for appellant: *Light & Galbraith.*

[PRIVY COUNCIL.]

GARNSEY AND ANOTHER . . . . . DEFENDANTS;

AND

FLOOD . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

J. C.* 1898 *May* 12; *June* 23.

Law of New South Wales—Crown Lands Acts—Reference by Land Appeal Court to Supreme Court—Effect of Decision.

In a suit by the respondent against the appellant to recover certain lands, it appeared that in an appeal to the Land Court to which the respondent and the Minister for Lands were parties, and of which the appellant had notice as a party interested, a reference was made to the Supreme Court, which decided that at the date of the appellant's application for them the lands were not Crown lands, and therefore not open for selection:—

Held, that this decision was conclusive and could not be reopened.

APPEAL from an order of the Supreme Court (Aug. 26, 1896) discharging a rule nisi for a new trial obtained by the appellant.

The facts are stated in the judgment of their Lordships.

The question decided was whether a decision by the Supreme Court, *In re Flood* (1), made on a reference by the Land Court, could be reopened in this suit. The Court there held that it was not within the scope or effect of Act 55 Vict. No. 1, to enable a valid application to be lodged for the lands in suit whilst their forfeiture was suspended in fact by a provisional reversal, and that until revocation of that reversal third parties could assert no rights in respect of the land.

The section referred to was as follows:—

Crown Lands Act Amendment Act of 1891 (55 Vict. No. 1), s. 3, sub-s. 2. A provisional reversal hereafter to be made of a forfeiture shall be deemed to have suspended or shall suspend as the case may be the operation of the forfeiture as from the date when such forfeiture has been or shall be notified declared

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

(1) (1894) 15 N. S. W. Rep. (Law) 330.

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or otherwise asserted or enforced; in any case where such provisional reversal shall afterwards be revoked such revocation shall have the same effect as if the provisional reversal so revoked had never been made.

Warrington, Q.C., and *Daldy*, for the appellants, contended upon this point that the Supreme Court, by the decision *In re Flood*, did not decide or purport to decide anything as to the rights of the appellants. The effect of their ruling was that the general words at the end of the Crown Lands Amendment Act, 1891, s. 3, sub-s. 2, enacting that a revocation of a provisional reversal of an order of forfeiture shall have the same effect as if the provisional reversal had never been made, only applied to the relationship between the Crown and its purchaser, and did not in any way affect the rights of third parties. It was therefore open to the appellants to contend that this decision was wrong. The Court in construction inserted the words "as between the Crown and the forfeiting purchaser," and limited the operation of the clause accordingly. That interpolation was not justified. The sub-section on its true construction, especially having regard to its earlier words, means that a provisional reversal, afterwards revoked, does not actually suspend the operation of the forfeiture, but is during its currency to be deemed to have that effect. It was submitted that there was no evidence that the appellants were parties to or represented upon any of the proceedings in relation to the respondent's applications, either before the local land board, or in the Land Court, or in the Supreme Court. It was contended that the lands in suit were Crown lands at the date of the appellant's application for them, made so by the forfeiture of them on September 21, 1892, the operation of which was not suspended by a provisional reversal thereof afterwards revoked. The revocation made them Crown lands from the date of the forfeiture. Besides, the appellant's applications were continuing tenders, and took effect during the six days which elapsed between the date of revocation and the date of the respondent's application. [Reference was made to *Ricketson* v. *Barbour*. (1)]

(1) [1893] A. C. 194.

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Sir R. T. Reid, Q.C., and *Vaughan Hawkins*, for the respondent, contended that the decision of the Supreme Court was conclusive, not having been appealed from: see Crown Lands Act of 1889, s. 8, sub-s. 6. Following upon that decision, the Land Appeal Court directed the land board to confirm the respondent's applications if there were no other objection than that dealt with by the Supreme Court, and the land board confirmed them accordingly. The land board also disallowed the appellant's application. Consequently the appellants at the date of suit had no title and no locus standi under the Crown Lands Acts. The decision of the Supreme Court to the effect that the lands in question were not Crown lands at the date of the appellant's application could not be reopened in this suit, and if reopened was manifestly right for the reasons therein stated. Accordingly, in this ejectment suit the respondent had shewn an absolute title, and the appellants had shewn no title whatever.

Daldy replied.

1898
June 23.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH. The respondent brought a suit in the Supreme Court of New South Wales against the appellants to recover possession of 640 acres of land situate in the Central Division, land district of Coonamble, county of Gregory, parish of Quambone, in the Colony of New South Wales, and 1920 acres of land situate in the same land district. On September 2, 1886, one Edith Florence Flood made an application under the Crown Lands Acts of New South Wales for the 640 acres as a conditional purchase, and an application for the 1920 acres as a conditional lease in virtue of the conditional purchase of the 640. These applications were confirmed by the local land board on July 18, 1887. On September 21, 1892, this conditional purchase and the conditional lease in virtue of it were by notice in the *Government Gazette* under s. 26 of the Crown Lands Act of 1884 (48 Vict. No. 18) declared to be forfeited. The effect of the forfeiture was, by s. 136 of this Act, that the lands became Crown land and might be dealt with as such, but no forfeiture could take effect until the

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expiration of thirty clear days after the notification in the *Gazette*. By s. 3 of the Crown Lands Act Amendment Act of 1891, power was given to the Minister for Lands to reverse any forfeiture, whether provisionally or otherwise, subject to the provisions thereinafter contained. The provision in sub-s. 2 of the section is as follows: "A provisional reversal hereafter to be made of a forfeiture shall be deemed to have suspended or shall suspend, as the case may be, the operation of the forfeiture as from the date when such forfeiture has been or shall be notified declared or otherwise asserted or enforced; in any case where such provisional reversal shall afterwards be revoked such revocation shall have the same effect as if the provisional reversal so revoked had never been made."

On October 25, 1892, the Minister for Lands approved of the provisional reversal of the before-mentioned forfeitures of the conditional purchase and the conditional lease, and on October 28 it was notified in the *Government Gazette*. On May 19, 1893, this provisional reversal was, by notification in the *Government Gazette*, revoked. In the meantime, on October 27, 1892, the appellant Isabella Garnsey, then Isabella Cambridge, lodged applications for a conditional purchase of the 640 acres, and for a conditional lease in virtue thereof of the 1920 acres. On May 25, 1893, the respondent lodged similar applications. On June 20, 1893, the local land board confirmed the applications of Isabella Cambridge, and on August 14 it disallowed the applications of Ida Flora Flood on the ground that the areas applied for were not available, the same having been confirmed to Isabella Cambridge on the previous June 20. Under the Crown Lands Act of 1884 (48 Vict. No. 18) there was an appeal from a decision of the local land board to the Minister for Lands. By the Crown Lands Act of 1889 (53 Vict. No. 21), s. 8, a Land Court was constituted and substituted for the Minister, to which any decision or award of any local land board may be appealed against, and by sub-s. 3 the Land Court has power to hear and determine all appeals, and the Crown may, without having lodged a caveat or appeared before the local land board, appear as a party in all proceedings in which its rights, interests, or revenues may be concerned, and all

parties may be heard by counsel, attorney, or agent. Subsect. 6 provides that whenever any question of law shall arise in a case before the Land Court it shall, if required by any of the parties or may of its own motion, state and submit a case for decision by the Supreme Court thereon, which decision shall be conclusive.

Ida Flora Flood appealed to the Land Court against the order of August 14, 1893, on the ground that the lands were Crown lands at the time of her applications, but were not Crown lands at the date of the applications of Isabella Cambridge. It appears from Exhibit 3 of the appellants' exhibits put in by them at the trial of the action that a notice of this appeal was served on Isabella Cambridge as a party interested on October 12, 1893. She did not appear at the hearing, but the Minister for Lands appeared and defended the case. On December 8, 1893, the Land Court dismissed the appeal, but Ida Flora Flood having required a case to be stated for the opinion of the Supreme Court, a special case was stated, the question for decision being "whether the provisional reversal of the forfeiture (which reversal was itself subsequently reversed) prevented the lands from being Crown lands for the purposes of Isabella Cambridge's application." The special case was heard before the Supreme Court on August 16, 1894, and is reported in 15 New South Wales Reports (Law) 330. The Minister appeared by counsel, and after the case had been fully argued by him and by counsel for Ida Flora Flood the Supreme Court held that when Isabella Cambridge applied for the land it was not Crown land, and therefore was not open for selection under the Crown Lands Act of 1884, and that the question submitted to the Court must be answered in the affirmative. Thereupon, on September 14, 1894, the Land Court made an order directing the land board to confirm Ida Flora Flood's applications, which was done by the land board on December 3, 1894. On the same day the land board reversed the order of June 20, 1893, and disallowed the applications of Isabella Cambridge (who had then become the wife of the other appellant). She appealed to the Land Court against this order. That Court held that it was technically defective, as a direction from it was necessary to

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enable the land board to reverse their former order, and on March 19, 1895, the Court made an order directing the land board to rehear the case and to disallow the application of Isabella Garnsey.

The action in which this appeal is brought was tried on September 3, 1895, when a verdict was found for the plaintiff. On October 20, 1895, a rule was obtained by the appellants calling upon the respondent to shew cause why the verdict should not be set aside and a new trial granted. On August 26, 1896, this rule was ordered to be discharged with costs, the Court refusing to allow the question which was decided on the special case to be reopened, and the present appeal is against that order.

Their Lordships are of opinion that the respondent had proved a good title to the possession of the lands in dispute. It follows from the decision of the Supreme Court that when Isabella Cambridge applied for the land it was not Crown land, and was not open for selection, and that the confirmation on June 30 of that application by the local land board could not have any effect. The Act of 1884 created a special court in the place of the Minister for Lands to hear appeals against adjudications or decisions of a local land board, and provided that upon questions of law submitted to it by the Land Court the decision of the Supreme Court should be conclusive. It would be wholly contrary to the design and purpose of the Crown Land Laws and the institution of the Land Court that the rival claimants of the land in this case should be allowed to raise the question which has been decided by the Supreme Court on the special case in an action in that Court and have its decision reviewed. The verdict was a proper one, and there was no ground for a new trial. Their Lordships will therefore humbly advise Her Majesty to affirm the order of the Supreme Court discharging the rule, and to dismiss this appeal, the costs of which are to be paid by the appellants.

Solicitors for appellants: *G. F. Hudson, Matthews & Co.*
Solicitors for respondent: *Light & Galbraith.*

[PRIVY COUNCIL.]

UNION BANK OF AUSTRALIA, LIMITED DEFENDANTS;

AND

MURRAY-AYNSLEY AND ANOTHER . . . PLAINTIFFS.

J. C.*
1898
May 13, 18; June 22.

ON APPEAL FROM THE HIGH COURT OF NEW ZEALAND (CANTERBURY DISTRICT).

Banker and Customer—Account not earmarked as Trust Account—Set-off.

Where a company received from the respondents trust moneys paid them to the credit of a separate account between it and the appellant bank, and failed:—

Held, in an action by the respondents, that, as the bank was not shewn to have received the moneys as trust funds, or to have received during the currency of the account notice of their trust character, the bank was entitled to set them off against its own claim against the company in liquidation.

APPEAL from a decree of the Supreme Court (Oct. 30, 1896) affirming a decree of Denniston J. (Aug. 11, 1896).

The facts are stated in the judgment of their Lordships.

Sir R. T. Reid, Q.C., and *Tindal Atkinson*, for the appellants, contended that on the facts proved the bank was entitled to set off the credit standing in favour of Miles & Co. in No. 3 account against the overdraft existing in the general and No. 2 accounts. There was no evidence of an agreement to treat No. 3 account as a trust account, or that the bank received the moneys sued for with the knowledge that they were trust moneys or were in any other way affected by the trusts concerning them. On the contrary, the evidence shewed that the bank received them as their customer's money on an ordinary account current between them. It was not clearly proved that they were trust moneys even in the hands of Miles & Co. There was no legal relation between the bank and the respondents, or any

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

J. C. 1898 UNION BANK OF AUSTRALIA v. MURRAY-AYNSLEY.

legal duty owing to the respondents by the bank which entitles them to recover in this suit or to maintain any action against the bank in relation thereto. [Reference was made to *Thomson* v. *Clydesdale Bank* (1); *Ex parte Kingston.* (2)]

Haldane, Q.C., and *Coles*, for the respondents, contended that the evidence shewed that the moneys in question were in fact trust moneys in the hands of Miles & Co., and that the bank opened the No. 3 account separate from the other accounts in order to keep those moneys separate, and to earmark them as moneys which did not belong to their customers in their own right, but were received by them for fiduciary purposes. The judge before whom the case was tried came to that finding of fact, and it was the only view of the fact which was consistent with the subsequent correspondence and general course of dealing between the bank and Miles & Co. It was a question of evidence, and, having regard to the facts proved, the bank were precluded from setting off the balance to the credit of No. 3 account against the balances to the debit of the other accounts.

1898 *June* 22.

The judgment of their Lordships was delivered by

LORD WATSON. The respondents, who are the plaintiffs in this action, are trustees under an ante-nuptial settlement executed by Mr. and Mrs. Harris in August, 1866. Mr. Murray-Aynsley was one of the two original trustees, and on the death of his co-trustee, the respondent, Mr. Archer, was appointed to the office on May 3, 1887. At that date both these gentlemen were partners of a firm of agents and general merchants, who carried on business at Christchurch and elsewhere, in the Colony of New Zealand, under the name of Miles & Co. Mr. Murray-Aynsley retired from the firm in 1892; and, on February 20, 1893, its business was transferred to a joint stock company, incorporated under the name of "Miles & Co., Limited," and was carried on by that company until it stopped payment on January 11, 1895. Mr. Archer was a member of the company, and was also one of its directors.

(1) [1893] A. C. 282. (2) (1871) L. R. 6 Ch. 632, 640.

The firm of Miles & Co., and their successors, Miles & Co., Limited, were customers of the appellant bank. For their convenience the bank kept two accounts, No. 1, which was the general account, and No. 2, which was known as the stock account of the concern. In September, 1891, at the request of the late Mr. Banks, then the managing partner of Miles & Co., a third account, known as No. 3, was opened for the firm, and was continued down to the stoppage of the company which succeeded them. The question involved in this appeal depends upon the object with which the account No. 3 was opened, and its true character as between the company and the appellant bank.

During the existence of Miles & Co. the respondents had invested 1800*l.* of the trust funds under their administration, through the agency of the firm, upon two loans, one of 1600*l.* to the Loyal Volunteer Lodge of Oddfellows at Sydenham, in the Colony of New Zealand, and another of 200*l.* to a person of the name of Kemp. The lodge of Oddfellows repaid their loan by two instalments of 200*l.* on October 26, and of 1400*l.* on December 6 in the year 1894; and on November 27, 1894, his loan of 200*l.* was repaid by Kemp. All these sums were received on behalf of the respondents by Miles & Co., Limited, who paid them as they were received into the appellant bank to the credit of account No. 3; and they stood at the credit of that account when the company failed.

Their Lordships do not find in the record any satisfactory evidence of the terms upon which these trust moneys were allowed by the respondents to pass into the hands of Miles & Co., Limited, and to remain so long in a bank account of which that company had the control, and upon which it received interest from the bank at the rate of 7 per cent. In the course of the argument upon this appeal it was stated by the appellants', and it was not disputed by the respondents', counsel, that, so long as the moneys remained in that account, Miles & Co., Limited, by the directions and with the authority of the respondents, regularly paid to Mr. Harris 5 per cent. upon their amount, the company retaining for its own purposes the difference of 2 per cent. The respondent Murray-Aynsley, who

J. C. 1898 — UNION BANK OF AUSTRALIA v. MURRAY-AYNSLEY.

was examined as a witness on his own side, was naturally somewhat reticent as to these points which might involve his personal responsibility. Speaking of his firm of Miles & Co., he says: "There might be large sums of money waiting investment on which we were paying interest. Long time might elapse before getting investment. I think we gave 5 per cent." Again, he says: "As long as we paid interest direct the loan was to us, and we treated it as firm's money." With regard to the trust moneys received by Miles & Co., Limited, in the end of the year 1894, he states, "I knew that these amounts were in the No. 3 before I signed the discharge to the insurance company." These statements appear to their Lordships to come to no more than this—that whilst the witness knew that the trust moneys were in the hands of the company as agents, and, in a certain sense, under their control, he believed that they were sufficiently earmarked as trust funds to ensure their safety by their having been paid into account No. 3.

The present action was brought against the appellant bank by the respondents, in July, 1895, claiming decree for payment of 1800*l.* out of the moneys standing to the credit of Miles & Co., Limited, with interest at the rate of 6 per cent. per annum from February 4, 1895, when the company went into liquidation. The case was tried on July 16, 1896, without a jury, before Denniston J., who, on August 11, 1896, gave judgment sustaining the respondents' claim with costs. An appeal at the instance of the present appellant against that judgment was dismissed by the majority of the Court of Appeal, consisting of Williams, Conolly, and Edwards JJ., Prendergast C.J. dissenting.

At the time when Miles & Co., Limited, went into liquidation, the company owed a large balance to the appellant bank, who claim the right to retain and apply all sums standing in their books at the credit of the company towards extinction of that balance. No objection is taken to their so dealing with the accounts No. 1 and No. 2. But the respondents aver and maintain that the account No. 3 was, at the time when the sums for which they sue were paid into it, and thereafter continued to be, "to the knowledge of the defendant bank, and

by arrangement between the said Miles & Company Limited and the defendant bank, a trust account of the said Miles & Company Limited." There is not on the face of the account No. 3 anything to shew that, in so far as concerned the relative position of the bank and its customers, it stood on any different footing from the other accounts kept by the company, or to indicate that it was opened or kept open for the purpose of receiving trust funds which were in the hands of the company. It was therefore incumbent upon the respondents to prove that the moneys for which they now sue were, in the knowledge of the bank, trust funds; and the only question arising in this appeal is whether the respondents have discharged themselves of that onus. Although there is a considerable amount of evidence, very little of it has any bearing upon the real point at issue; and that little is, in their Lordships' opinion, decidedly adverse to the respondents' contention. Notwithstanding the preponderance of judicial opinion in favour of the respondents in the Courts below, their Lordships have found it impossible to differ from the conclusions of the learned Chief Justice, the dissentient member of the Court.

It appears that, in consequence of the death of Mr. Banks, who was an active partner of the firm of Miles & Co., and who in 1891 made the arrangement with the bank for opening the account No. 3, the respondents have been deprived of any advantage which they might have obtained from his testimony. It is proved by Bolton, a clerk who was in the employment of Miles & Co., Limited, that, on the company succeeding to the business of the firm, the account No. 3 was simply transferred to them along with Nos. 1 and 2. There is also evidence to the effect that moneys received for investment were generally paid into account No. 3; but that circumstance is not in the least calculated to suggest that No. 3 was a trust account in the sense for which the respondents contend. It might, for many reasons, be convenient for the firm or the company to have these moneys kept in a separate account, and not mixed up with their other transactions; but there is not a tittle of evidence to shew that these moneys received for investment belonged to trustees, or that they were held by the firm or

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company in trust, and not simply as agents for the real owners, their principals.

Apart from the evidence bearing upon the opening of the account, and the terms of the arrangement which is said to have been then made between the bank and the firm of Miles & Co., there is nothing to prove or even to suggest that any notice was subsequently conveyed to the bank of the trust character of the funds which the respondents are claiming in this action. The only witness who speaks to the arrangement of 1891 is Samuel Hallamore, the manager of the bank, who was called by the respondents. He says, in his evidence-in-chief, "Mr. Banks saw me about opening No. 3 account. He said he wished to open a separate account. That he had received a large amount of money which was to be invested or remitted to London, and he asked me if I had any objection to open a separate account, and treat it in the same way as No. 2 in regard to the general overdrawn account. I understood him to mean with regard to interest. I told him he was at liberty to open as many accounts as suited his convenience. He did not say whom these moneys belonged to, said nothing about a trust account. I had no idea whom they belonged to."

Their Lordships do not think it necessary to make any observation upon these statements beyond this—that, if believed, they directly disprove the allegation that No. 3 was in any sense a trust account. If not believed, the respondents are in this dilemma—that they have no proof whatever relating to the allegation upon which their claim is founded. It is right to say that Denniston J., who tried the case, gave "credit to Mr. Hallamore for perfect honesty in his evidence." But the learned judge, instead of accepting his evidence and construing it according to the plain meaning of his words, adopts what appears to their Lordships to be the dangerous course of first assuming that his statement must very imperfectly represent his conversation with Mr. Banks, and then building upon that assumption a series of speculations and conjectures, arising not out of but outside the evidence, resulting in the conclusion of fact that "the manager must have known, or have had strong

reason to believe, that the moneys referred to were not the moneys of the firm." The same species of fallacy pervades the reasoning of the learned judges of the majority of the Appeal Court, who do not appear to their Lordships sufficiently to appreciate the broad legal distinction between the relation of an agent, habitually entrusted with the disposal of their money by his principals, to his own bankers, and his relation to the principals themselves.

Their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the action, with costs to the appellant bank in both Courts below. The respondents must pay to the appellants their costs of this appeal.

Solicitors for appellants: *Murray, Hutchins, Stirling & Murray.*

Solicitors for respondents: *Collyer-Bristow, Russell, Hill, Curtis & Dods.*

[PRIVY COUNCIL.]

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ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } APPELLANT;

AND

ATTORNEYS-GENERAL FOR THE PROVINCES OF ONTARIO, QUEBEC, AND NOVA SCOTIA . . . . . } RESPONDENTS.

ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO . . . . } APPELLANT;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . } RESPONDENT.

ATTORNEYS-GENERAL FOR THE PROVINCES OF QUEBEC AND NOVA SCOTIA . . . . . } APPELLANTS;

AND

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

British North America Act, 1867, *ss.* 91, 92, 108—*Distribution of Legislative Power—Construction—Rivers and Lake Improvements—"Public Harbours"—Fisheries and Fishing Rights—Revised Statutes of Canada, c.* 92, *c.* 95, *s.* 4—*Revised Statutes of Ontario, c.* 24, *s.* 47—*Ontario Act of* 1892 (55 *Vict. c.* 10).

Whatever proprietary rights vested in the provinces at the date of British North America Act, 1867, remained so unless by its express enactments transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of those proprietary rights.

Held, that the transfer by s. 108 and the 5th clause of its schedule to the Dominion of "rivers and lake improvements" operates on its true construction in regard to the improvements only both of rivers and lakes, and not in regard to the entire rivers. Such construction does no violence

* *Present:* THE LORD CHANCELLOR, LORD HERSCHELL, LORD WATSON, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, LORD DAVEY, and SIR HENRY DE VILLIERS.

to the language employed, and is reasonably and probably in accordance with the intention of the Legislature :—

Held, that the transfer of "public harbours" operates on whatever is properly comprised in that term having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been executed.

With regard to fisheries and fishing rights :—

Held, (1.) that s. 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enable it to affect those rights to an unlimited extent, short of transferring them to others.

(2.) a tax by way of licence as a condition of the right to fish is within the powers conferred by sub-ss. 4 and 12.

(3.) the same power is conferred on the Provincial Parliament by s. 92.

(4.) Revised Statutes of Canada, c. 95, s. 4, so far as it empowers the grant of exclusive fishing rights over provincial property, is ultra vires the Dominion.

(5.) Revised Statutes of Ontario, c. 24, s. 47, is with a specific exception intra vires the province.

As regards Ontario Act, 1892, the regulations therein which control the manner of fishing are ultra vires. Fishing regulations and restrictions are within the exclusive competence of the Dominion: see s. 91, sub-s. 12. *Secus* with regard to any provisions relating thereto which would properly fall under the headings "Property and Civil Rights" or "The Management and Sale of Public Lands" :—

Held, further, that the Dominion Legislature had power to pass Revised Statutes of Canada, c. 92, intituled "An Act respecting certain Works constructed in or over Navigable Waters."

THREE appeals by the Dominion of Canada, by the Province of Ontario, and by the Provinces of Quebec and Nova Scotia from a judgment of the Supreme Court (Oct. 13, 1896), delivered upon seventeen questions referred to it by the Governor-General of Canada pursuant to Revised Statutes of Canada, c. 35, as amended by Canadian statute 54 & 55 Vict. c. 25.

The questions referred were as follows :—

(1.) Did the beds of all lakes, rivers, public harbours, and other waters, or any and which of them, situate within the territorial limits of the several provinces, and not granted before confederation, become under the British North America Act the property of the Dominion or the property of the province in which the same respectively are situate, and is there in that respect any and what distinction between the various

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classes of waters, whether salt waters or fresh waters, tidal or non-tidal, navigable or non-navigable, or between the so-called great lakes, such as Lakes Superior, Huron, Erie, &c., and the other lakes, or the so-called great rivers, such as the St. Lawrence River, the Richelieu, the Ottawa, &c., and other rivers, or between waters directly and immediately connected with the sea-coast and waters not so connected, or between other waters and waters separating (and so far as they do separate) two or more provinces of the Dominion from one another, or between other waters and waters separating (and so far as they do separate) the Dominion from the territory of a foreign nation?

(2.) Is the Act of the Dominion Parliament, Revised Statutes of Canada, c. 92, intituled "An Act respecting certain Works constructed in or over Navigable Waters," an Act which the Dominion Parliament had jurisdiction to pass either in whole or in part?

(3.) If not, in case the bed and banks of a lake or navigable river belong to a province, and the province makes a grant of land extending into the lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, has the grantee a right to build thereon accordingly, subject to the work not interfering with the navigation of the lake or river?

(4.) In case the bed of a public harbour or any portion of the bed of a public harbour at the time of confederation had not been granted by the Crown, has the province a like jurisdiction in regard to the making a grant as and for the purpose in preceding paragraph stated, subject to not thereby interfering with navigation, or other full use of the harbour as a harbour, and subject to any Dominion legislation within the competence of the Dominion Parliament?

(5.) Had riparian proprietors before confederation an exclusive right of fishing in non-navigable lakes, rivers, streams, and waters, the beds of which had been granted to them by the Crown?

(6.) Has the Dominion Parliament jurisdiction to authorize the giving by lease, licence, or otherwise to lessees, licensees or other grantees, the right of fishing in such waters as mentioned in the last question, or any and which of them?

(7.) Has the Dominion Parliament exclusive jurisdiction to authorize the giving by lease, licence, or otherwise to lessees, licensees, or other grantees, the right of fishing in such waters as mentioned in the last question, or any, and which of them?

(8.) Has the Dominion Parliament such jurisdiction as regards navigable or non-navigable waters, the beds and banks of which are assigned to the provinces respectively under the British North America Act, if any such are so assigned?

(9.) If the Dominion Parliament has such jurisdiction as mentioned in the preceding three questions, has a Provincial Legislature jurisdiction for the purpose of provincial revenue or otherwise to require the Dominion lessee, licensee, or other grantee to take out a provincial licence also?

(10.) Had the Dominion Parliament jurisdiction to pass s. 4 of the Revised Statutes of Canada, c. 95, intituled "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, or any and which of such several sections, or any and what parts thereof respectively?

(11.) Had the Dominion Parliament jurisdiction to pass s. 4 of the Revised Statutes of Canada, c. 95, intituled, "An Act respecting Fisheries and Fishing," or any other of the provisions of the said Act, so far as these respectively relate to fishing in waters, the beds of which do not belong to the Dominion, and are not Indian lands?

(12.) If not, has the Dominion Parliament any jurisdiction in respect of fisheries, except to pass general laws not derogating from the property in the lands constituting the beds of such waters as aforesaid, or from the rights incident to the ownership by the provinces, and others, but (subject to such property and rights) providing in the interests of the owners and the public, for the regulation, protection, improvement, and preservation of fisheries, as for example, by forbidding fish to be taken at improper seasons, preventing the undue destruction of fish by taking them in an improper manner, or with improper engines, prohibiting obstructions in ascending rivers, and the like?

(13.) Had the Legislature of Ontario jurisdiction to enact the 47th section of the Revised Statutes of Ontario, c. 24, intituled "An Act respecting the Sale and Management of Public

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Lands"; and ss. 5 to 13, both inclusive, and ss. 19 to 21, both inclusive, of the Ontario Act of 1892, intituled "An Act for the Protection of the Provincial Fisheries," or any and which of such several sections, or any and what parts thereof respectively?

(14.) Had the Legislature of Quebec jurisdiction to enact ss. 1375 to 1378 inclusive of the Revised Statutes of Quebec, or any and which of the said sections, or any and what parts thereof?

(15.) Has a province jurisdiction to legislate in regard to providing fishways in dams, slides, and other constructions, and otherwise to regulate and protect fisheries within the province, subject to and so far as may consist with any laws passed by the Dominion Parliament within its constitutional competence?

(16.) Has the Dominion Parliament power to declare what shall be deemed an interference with navigation and require its sanction to any work, or erection in or filling up of navigable waters?

(17.) Had riparian proprietors, before confederation, an exclusive right of fishing in navigable non-tidal lakes, rivers, streams, and waters, the beds of which had been granted to him by the Crown?

The judges of the Supreme Court (Strong C.J., Taschereau, Gwynne, King, and Girouard JJ.) differed with respect to the answers to be given, and delivered separate written opinions.

The opinions of the majority of the judges were to the effect that the beds of all ungranted waters situate within the territorial limits of a province were the property of such province and not of the Dominion, with the exception only of public harbours, as to which the decision in *Holman* v. *Green* (1) was binding; that the Provincial Governments alone had power to grant leases and licences as to fishing in such waters; that the jurisdiction of the Dominion as to fisheries was limited to passing general laws which without derogating from the property in the beds of such waters or from the rights incident to the ownership thereof might provide in the interest of the owners and the public for the regulation, protection, improve-

(1) (1881) 6 Sup. Can. Rep. 707.

ment and preservation of fisheries, and that the Provincial Legislatures had jurisdiction to make regulations as to fisheries within their respective provinces so far as such regulations were not inconsistent with and were not superseded by Dominion legislation.

With reference to the statutes referred to in questions 2, 10, 11, 13, and 14, the majority of the judges were of opinion that the Revised Statutes of Canada, c. 92, "An Act respecting certain Works constructed in or over Navigable Waters," was intra vires, and that the Dominion Parliament had power to declare what should be deemed an interference with navigation and require its sanction to any work or erection in, or filling up of navigable waters, but that as regards the Revised Statutes of Canada, c. 95, "An Act respecting Fisheries and Fishing," s. 4, when enforced outside Dominion waters, and ss. 14 sub-s. 1, 21 sub-ss. 1, 2, 3, and 22 were ultra vires; that s. 47 of the Revised Statutes of Ontario, c. 24, "An Act respecting the Sale and Management of Public Lands," ss. 5 to 13 and 19 to 21 of 55 Vict. c. 10, "An Act for the Protection of the Provincial Fisheries," and ss. 1375 to 1378 of the Revised Statutes of Quebec, were intra vires, provided that and so long as they did not conflict with Dominion legislation.

Robinson, Q.C., *Haldane, Q.C.*, *Mactavish, Q.C.*, and *Loehnis*, for the Dominion of Canada, contended that the beds of all waters referred to in question 1 are the property of the Dominion; and that the Dominion has exclusive jurisdiction to give by lease or licence the right of fishing in all non-navigable and navigable waters: that all the provisions of Revised Statutes of Canada, c. 95, are intra vires. They further contended that Revised Statutes of Ontario, c. 24, s. 47, Ontario Act of 1892, ss. 5–13 and 19–21, and Revised Statutes of Quebec, ss. 1375–1378, are ultra vires. In general they contended that all the questions should have been answered favourably to the jurisdiction claimed on behalf of the Dominion; and that the answers to questions 1, 6–8, 10, 11, 13–15 were, so far as they were adverse to the claim of the Dominion, wrong in law.

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The reasons given were that the Dominion was, under the British North America Act, 1867, the exclusive legislative authority for trade and commerce, defence, navigation and shipping, and sea-coast and inland fisheries. The executive power of the Dominion was, in the absence of express enactment to the contrary, coextensive with the legislative power. Accordingly, the Act of 1867 must be construed as vesting the beds of all waters not granted before confederation exclusively in the Crown in right of the Dominion. The common law as to the ownership of waters which, though non-tidal, are in fact navigable, is not applicable to the great lakes and rivers of Canada, or to waters separating two or more provinces of the Dominion, or separating the Dominion from foreign territory. Again, the rights of the Crown in all navigable waters are amongst the regalia or prerogative rights which are in the Dominion under sect. 102. Rivers, moreover, are specifically mentioned in Sched. III. to the Act of 1867, and consequently became the property of the Dominion under s. 108. As regards s. 109, there is excepted from the operation of that section the interest of the Dominion in so much of the regalia as is immediately connected with the subject of legislation exclusively assigned to the Dominion by s. 91. Legislative authority over property and civil rights so far as the same are connected with fisheries is in the Dominion by virtue of s. 91, sub-s. 12, and not in the provinces. The taxation of Dominion lessees and licensees by a province is ultra vires of provincial authority, and inconsistent with the powers of the Dominion to grant such leases and licences, and an interference with the power of the Dominion.

[Reference was made to *Reg.* v. *Robertson* (1); *Holman* v. *Green* (2); *L'Union Jacques de Montréal* v. *Bélisle* (3); *Bank of Toronto* v. *Lambe.* (4)]

Blake, Q.C., *Irving, Q.C.*, and *J. M. Clark*, for the Province of Ontario, contended that so much of the answers as were adverse to Ontario were wrong in law; while the answers favourable to the province relating to the beds of waters, the

(1) (1882) 6 Sup. Court Can. 52.
(2) 6 Sup. Can. Rep. 707.
(3) (1874) L. R. 6 P. C. 31, 37.
(4) (1887) 12 App. Cas. 575.

waters over the beds, and the fish in such waters, should be affirmed.

It was contended that legislative jurisdiction and proprietary right are dealt with by the Act of 1867 on quite different principles. Their limits are not identical. Transfer to the Dominion of proprietary right in any subject cannot be inferred from the grant of legislative jurisdiction over that subject. It must be expressly given. The residue of proprietary rights not transferred to the Dominion by s. 108 and Sched. III. remain vested in the provinces subject to ss. 109 and 117. On the other hand, the residuum of legislative jurisdiction not comprised in ss. 91 and 92 is vested in the Dominion. Proprietary rights, therefore, conferred on the Dominion depend on the enumerations contained in Sched. III. Beds of lakes, rivers, public harbours, and other waters within the limits of Ontario were at the time of the union "lands" within s. 109, and "public property" within s. 117. It has always been held that such lands remain vested in the Crown in right of the province, and that there exists over such inland waters rights of navigation and fishing analogous to those which exist over British navigable waters. The waters over the beds, together with the fish therein, belong to the province to which the beds belong. The legislative jurisdiction of the Dominion over shipping and navigation and fisheries does not imply a transfer of proprietary right; nor does the implication of executive powers involved in legislative jurisdiction warrant the inference of such transfer. Rivers, again, are not made Dominion property under the enumeration of "rivers and lake improvements" in Sched. III. read with s. 108. The phrase means on its true construction the improvements on any lake or river. The Dominion has no jurisdiction to lease or license rights of fishing; it would be an interference with "property and civil rights" competent only to the province. Sect. 91, sub-s. 12, gives the right to legislate generally with regard to the regulation and conservation of fisheries—not to interfere with property and civil rights. Even if the Dominion could grant a lease or licence, the province has, for the purpose of provincial revenue, a right to impose on the lessee or licensee

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a provincial licence also. Revised Statutes of Canada, c. 95, so far as it extends beyond general regulation and infringes "property and civil rights," is ultra vires. With regard to the Ontario Act of 1892, it is competent to the province as owner to protect or secure the interests of the owner so long as it does not interfere with the fishery powers of the Dominion. The province has power to regulate and protect fisheries so far as is consistent with valid Dominion laws.

With regard to public harbours, any proprietary right of the Dominion must depend on the interpretation of that phrase as it stands in Sched. III. and s. 108. It was contended that only public harbours which were "public works and property of the province" were dealt with: see the words at the head of the schedule. This did not include the ownership of the beds of harbours further than the soil of so much of the harbour as had been the subject or site of the expenditure of public money by the province, and thus had become a provincial public work and property. With that exception, the ownership of the beds remained in the former in right of the province, subject to all public rights, as of navigation. Whatever legislative powers the Dominion may possess in reference to harbours, that does not involve transference of proprietary right. With regard to Revised Statutes of Canada, c. 92, so far as its provisions are within the heading "Navigation and Shipping," and limited to those of a general and regulative character, it would be intra vires; so far as they were in excess of such regulation, it is ultra vires. It cannot validly interfere with property and civil rights, or authorize local interference with the public right of navigation. As to Revised Statutes of Ontario, c. 24, s. 47, it was in effect a re-enactment of an Act of the late Province of Canada, 23 Vict. c. 2, s. 35, and its validity depends on provincial proprietary right.

Longley (*Attorney-General for Nova Scotia*) and *Coward*, for the Province of Nova Scotia.

Cannon (*Assistant Attorney-General for Quebec*) and *Coward*, for the Province of Quebec.

Robinson, Q.C., replied, and *Blake, Q.C.*, in the cross-appeal.

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1898. May 26. The judgment of their Lordships was delivered by

LORD HERSCHELL. The Governor-General of Canada by Order in Council referred to the Supreme Court of Canada for hearing and consideration various questions relating to the property, rights, and legislative jurisdiction of the Dominion of Canada and the provinces respectively in relation to rivers, lakes, harbours, fisheries, and other cognate subjects.

The Supreme Court having answered some of the questions submitted adversely to the Dominion and some adversely to the provinces, both parties have appealed.

Before approaching the particular questions submitted, their Lordships think it well to advert to certain general considerations which must be steadily kept in view, and which appear to have been lost sight of in some of the arguments presented to their Lordships.

It is unnecessary to determine to what extent the rivers and lakes of Canada are vested in the Crown, or what public rights exist in respect of them. Whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they may be modified by legislation, are precisely the same. The answer, therefore, to such questions as those adverted to would not assist in determining whether in any particular case the property is vested in the Dominion or in the province. It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by

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any of its express enactments transferred to the Dominion of Canada.

With these preliminary observations their Lordships proceed to consider the questions submitted to them. The first of these is whether the beds of all lakes, rivers, public harbours, and other waters, or any and which of them situate within the territorial limits of the several provinces, and not granted before confederation, became under the British North America Act the property of the Dominion.

It is necessary to deal with the several subject-matters referred to separately, though the answer as to each of them depends mainly on the construction of the 3rd schedule to the British North America Act. By the 108th section of that Act it is provided that the public works and property of each province enumerated in the schedule shall be the property of Canada. That schedule is headed "Provincial Public Works and Property to be the Property of Canada," and contains an enumeration of various subjects, numbered 1 to 10. The 5th of these is "rivers and lake improvements." The word "rivers" obviously applies to nothing which was not vested in the province. It is contended on behalf of the Dominion that under the words quoted the whole of the rivers so vested were transferred from the province to the Dominion. It is contended, on the other hand, that nothing more was transferred than the improvements of the provincial rivers, that is to say, only public works which had been effected, and not the entire beds of the rivers. If the words used had been "river and lake improvements," or if the word "lake" had been in the plural, "lakes," there could have been no doubt that the improvements only were transferred. Cogent arguments were adduced in support of each of the rival constructions. Upon the whole their Lordships, after careful consideration, have arrived at the conclusion that the Court below was right, and that the improvements only were transferred to the Dominion. There can be no doubt that the subjects comprised in the schedule are for the most part works or constructions which have resulted from the expenditure of public money, though there are exceptions. It is to be observed that rivers and lake improvements are coupled

together as one item. If the intention had been to transfer the entire bed of the rivers and only artificial works on lakes, one would not have expected to find them thus coupled together. Lake improvements might in that case more naturally have been found as a separate item or been coupled with canals. Moreover, it is impossible not to be impressed by the inconvenience which would arise if the entire rivers were transferred, and only the improvements of lakes. How would it be possible in that case to define the limits of the Dominion and provincial rights respectively? Rivers flow into and out of lakes; it would often be difficult to determine where the river ended and the lake began. Reasons were adduced why the rivers should have been vested in the Dominion; but every one of these reasons seems equally applicable to lakes. The construction of the words as applicable to the improvements of rivers only is not an impossible one. It does no violence to the language employed. Their Lordships feel justified, therefore, in putting upon the language used the construction which seems to them to be more probably in accordance with the intention of the Legislature.

With regard to public harbours their Lordships entertain no doubt that whatever is properly comprised in this term became vested in the Dominion of Canada. The words of the enactment in the 3rd schedule are precise. It was contended on behalf of the provinces that only those parts of what might ordinarily fall within the term "harbour" on which public works had been executed became vested in the Dominion, and that no part of the bed of the sea did so. Their Lordships are unable to adopt this view. The Supreme Court, in arriving at the same conclusion, founded their opinion on a previous decision in the same Court in the case of *Holman* v. *Green* (1), where it was held that the foreshore between high and low water-mark on the margin of the harbour became the property of the Dominion as part of the harbour.

Their Lordships think it extremely inconvenient that a determination should be sought of the abstract question, what falls within the description "public harbour." They must

(1) 6 Sup. Can. Rep. 707.

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decline to attempt an exhaustive definition of the term applicable to all cases. To do so would, in their judgment, be likely to prove misleading and dangerous. It must depend, to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour. It is only possible to deal with definite issues which have been raised. It appears to have been thought by the Supreme Court in the case of *Holman* v. *Green* (1) that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water-mark, being also Crown property, likewise passed to the Dominion.

Their Lordships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it.

Their Lordships pass now to the questions relating to fisheries and fishing rights.

Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, "Sea-Coast and Inland Fisheries" in s. 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in

(1) 6 Sup. Can. Rep. 707.

relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose (which it was admitted the Dominion Legislature was empowered to pass) might very seriously touch the exercise of proprietary rights, and the extent, character, and scope of such legislation is left entirely to the Dominion Legislature. The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected. If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the provinces and not vested in it.

In addition, however, to the legislative power conferred by the 12th item of s. 91, the 4th item of that section confers upon the Parliament of Canada the power of raising money by any mode or system of taxation. Their Lordships think it is impossible to exclude as not within this power the provision imposing a tax by way of licence as a condition of the right to fish.

It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention.

Their Lordships are quite sensible of the possible inconveniences, to which attention was called in the course of the

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arguments, which might arise from the exercise of the right of imposing taxation in respect of the same subject-matter and within the same area by different authorities. They have no doubt, however, that these would be obviated in practice by the good sense of the legislatures concerned.

It follows from what has been said that in so far as s. 4 of the Revised Statutes of Canada, c. 95, empowers the grant of fishery leases conferring an exclusive right to fish in property belonging not to the Dominion, but to the provinces, it was not within the jurisdiction of the Dominion Parliament to pass it. This was the only section of the Act which was impeached in the course of the argument; but the subsidiary provisions, in so far as they are intended to enforce a right which it was not competent for the Dominion to confer, would of course fall with the principal enactment.

Their Lordships think that the Legislature of Ontario had jurisdiction to enact the 47th section of the Revised Statutes of Ontario, c. 24, except in so far as it relates to land in the harbours and canals, if any of the latter be included in the words "other navigable waters of Ontario." The reasons for this opinion have been already stated when dealing with the questions in whom the beds of harbours, rivers, and lakes were vested.

The sections of the Ontario Act of 1892, intituled, "An Act for the Protection of the Provincial Fisheries," which are in question, consist almost exclusively of provisions relating to the manner of fishing in provincial waters. Regulations controlling the manner of fishing are undoubtedly within the competence of the Dominion Parliament. The question is whether they can be the subject of provincial legislation also in so far as it is not inconsistent with the Dominion legislation.

By s. 91 of the British North America Act, the Parliament of the Dominion of Canada is empowered to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects by that Act assigned exclusively to the legislatures of the provinces, "and for greater certainty, but not so as to restrict the

generality of the foregoing terms of this section," it is declared that (notwithstanding anything in the Act) "the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated." The 12th of them is "Sea-Coast and Inland Fisheries."

The earlier part of this section read in connection with the words beginning "and for greater certainty" appears to amount to a legislative declaration that any legislation falling strictly within any of the classes specially enumerated in s. 91 is not within the legislative competence of the Provincial Legislatures under s. 92. In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the "exclusive" legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent. It has been suggested, and this view has been adopted by some of the judges of the Supreme Court, that although any Dominion legislation dealing with the subject would override provincial legislation, the latter is nevertheless valid, unless and until the Dominion Parliament so legislates. Their Lordships think that such a view does not give their due effect to the terms of s. 91, and in particular to the word "exclusively." It would authorize, for example, the enactment of a bankruptcy law or a copyright law in any of the provinces unless and until the Dominion Parliament passed enactments dealing with those subjects. Their Lordships do not think this is consistent with the language and manifest intention of the British North America Act.

It is true that this Board held in the case of *Attorney-General of Canada* v. *Attorney-General of Ontario* (1) that a law passed by a Provincial Legislature which affected the assignments and property of insolvent persons was valid as falling within the heading "Property and Civil Rights," although it was of such a nature that it would be a suitable ancillary provision to a bankruptcy law. But the ground of this decision

(1) [1894] A. C. 189.

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was that the law in question did not fall within the class "Bankruptcy and Insolvency" in the sense in which those words were used in s. 91.

For these reasons their Lordships feel constrained to hold that the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures.

But whilst in their Lordships' opinion all restrictions or limitations by which public rights of fishing are sought to be limited or controlled can be the subject of Dominion legislation only, it does not follow that the legislation of Provincial Legislatures is incompetent merely because it may have relation to fisheries. For example, provisions prescribing the mode in which a private fishery is to be conveyed or otherwise disposed of, and the rights of succession in respect of it, would be properly treated as falling under the heading "Property and Civil Rights" within s. 92, and not as in the class "Fisheries" within the meaning of s. 91. So, too, the terms and conditions upon which the fisheries which are the property of the province may be granted, leased, or otherwise disposed of, and the rights which consistently with any general regulations respecting fisheries enacted by the Dominion Parliament may be conferred therein, appear proper subjects for provincial legislation, either under class 5 of s. 92, "The Management and Sale of Public Lands" or under the class "Property and Civil Rights." Such legislation deals directly with property, its disposal, and the rights to be enjoyed in respect of it, and was not in their Lordships' opinion intended to be within the scope of the class "Fisheries" as that word is used in s. 92.

The various provisions of the Ontario Act of 1892 were not minutely discussed before their Lordships, nor have they the information before them which would enable them to give a definite and certain answer as to every one of the sections in question. The views, however, which they have expressed and the dividing line they have indicated will, they apprehend, afford the means of determining upon the validity of any particular provision or the limits within which its operation may be

upheld, for it is to be observed that s. 1 of the Act limits its operation to "fishing in waters and to waters over or in respect of which the Legislature of this province has authority to legislate for the purposes of this Act."

Sects. 1375, 1376, and the 1st sub-section of s. 1377 of the Revised Statutes of Quebec afford good illustrations of legislation such as their Lordships regard as within the functions of a Provincial Legislature.

Their Lordships entertain no doubt that the Dominion Parliament had jurisdiction to pass the Act intituled, "An Act respecting certain Works constructed in or over Navigable Waters." It is in their opinion clearly legislation relating to "navigation."

Their Lordships must decline to answer the last question submitted as to the rights of riparian proprietors. These proprietors are not parties to this litigation or represented before their Lordships, and accordingly their Lordships do not think it proper when determining the respective rights and jurisdictions of the Dominion and Provincial Legislatures to express an opinion upon the extent of the rights possessed by riparian proprietors.

The parties will of course bear their own costs of these proceedings.

Solicitors for Dominion: *Day, Russell & Co.*
Solicitor for Ontario: *S. V. Blake.*
Solicitors for Quebec and Nova Scotia: *Hill, Son & Rickards.*

[PRIVY COUNCIL.]

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MONTREAL GAS COMPANY . . . . DEFENDANTS;

AND

CADIEUX . . . . . PLAINTIFF.

Ex parte MONTREAL GAS COMPANY.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Practice—Special Leave to Appeal—Condition as to Costs.

Special leave to appeal may be given on terms that the appellants should be liable to pay the respondent's costs in any event.

THIS was a petition for special leave to appeal from a judgment of the Supreme Court (May 6, 1898). The petition alleged on September 19, 1895, that the gas was cut off from the respondent's house in Notre Dame Street, Montreal, for non-payment of $21.34 gas dues; and on December 5, 1895, was cut off from the respondent's house in St. Charles Borromeo Street, the default being the failure to pay gas dues for the Notre Dame house; that the respondent applied for a mandamus to the company to supply gas to the St. Charles Borromeo house; that the Superior Court granted the mandamus; that the Court of Queen's Bench in Appeal quashed it; that the Supreme Court by a majority restored the order of the Supreme Court.

Blake, Q.C., and *Brosseau*, for the petitioners, the defendants, submitted that the question raised was one of general importance to all gas consumers—whether under the provisions of 12 Vict. c. 183 the petitioners are compelled to supply gas to a person in one place when he neglects and refuses to pay the sums due by him for gas supplied in another place.

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

Macmaster, Q.C., for the plaintiff, submitted that it was a question of more interest to the gas companies than the gas consumers; and that the plaintiff, having succeeded in the courts of the country, ought not to be put to further costs of litigation in reference to so small an amount.

LORD WATSON. Her Majesty will be advised to give the petitioners leave to appeal upon the condition of their submitting to pay to the respondent his costs of the appeal in any event, if their Lordships should so direct on the determination of the appeal.

Solicitor for petitioners: *S. V. Blake.*

Solicitors for respondent: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

[PRIVY COUNCIL.]

J. C.* 1898 May 4, 10, 11; June 23.

KING . . . . . PLAINTIFF;

AND

HENDERSON . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Act of Bankruptcy—Jurisdiction of Bankruptcy Judge—Rule of Procedure, No. 51, *ultra vires—Registrar's Judgment inadmissible—Indirect Motive of Petitioner—Fraud.*

Under the New South Wales Bankruptcy Acts, 1887–8, an act of bankruptcy may be constituted by non-compliance with a bankruptcy notice under s. 4, sub-s. 2, of the principal Act. Ample discretion is vested in the judge to grant or refuse a sequestration order founded on the notice, and if granted to discharge or annul it. But no jurisdiction is given by the Acts to annul an act of bankruptcy or declare that it never was committed; and cannot be given by a rule of procedure framed under s. 119, which on its true construction does not authorize a rule purporting to create a jurisdiction in excess of that conferred by the Act.

The "full written judgment" of the registrar whose order refused the respondent's petition of sequestration against the appellant was rightly held to be inadmissible in evidence in an action against the respondent for having maliciously presented his petition. The respondent was bound by the registrar's discretion as to making or refusing the order, not by his opinion upon points which he had no jurisdiction to determine.

Ex parte Vitoria, [1894] 2 Q. B. 387, approved.

It is neither fraud nor an abuse of process to petition for a sequestration order with an indirect motive, that is, for a purpose other than the equal distribution of the testator's assets, as, for example, to exclude the appellant from a partnership; *secus* if such order would in the circumstances be unsuitable, and enable the petitioner fraudulently to defeat the rights of others whether legal or equitable.

Ex parte Wilbran, (1820) 5 Madd. 1, approved.

APPEAL from an order of the Supreme Court (Feb. 17, 1897) refusing a rule nisi to set aside a nonsuit and to order a new trial in an action by the appellant for damage for maliciously presenting a bankruptcy petition against him.

The facts are stated in the judgment of their Lordships.

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

C. A. Russell, Q.C., and *J. A. Hamilton*, for the appellant, contended that the Court below was wrong in holding that no action for maliciously presenting a bankruptcy petition would lie, if there be a valid act of bankruptcy and a valid petitioning creditor's debt. It is necessary in law that a petitioner should not be using the process of the Court for an indirect or improper purpose. The Court should have held that legal process, not in itself devoid of foundation, may be deemed to have been employed maliciously and without reasonable or probable cause. The evidence shewed that here it was an abuse of the process of the Court, for it was employed for an indirect and collateral purpose and for the purpose of oppression. The respondent, it was shewn, had a strong desire that the appellant should quit the firm of King & Co. That partnership could only be dissolved by consent, and the appellant refused his consent. The respondent was shewn to have strong reasons of his own for desiring the continuance of the firm of King & Co. By making the appellant bankrupt he would oust the appellant from the firm and at the same time destroy his only means of paying his debts, namely, his interest in the firm. There was, therefore, no bonâ fide desire of obtaining the distribution of his assets, for his assets, consisting of his interest in the firm, would have disappeared. The respondent presented his petition under a false colour for a concealed object; and his doing so was an abuse of the process of the Court and a fraud. Reference was made to *Metropolitan Bank* v. *Pooley* (1); *Johnson* v. *Emerson* (2); *Quartz Hill Gold Mining Co.* v. *Eyre*. (3) The motives of the petitioner must be justifiable even if all the conditions have happened which entitle him to his order: see *Ex parte Browne* (4); *Ex parte Gallimore* (5); *Ex parte Bourne* (6); *Ex parte Phipps* (7); *In re Davies* (8); *Ex parte Griffin, In re Adams* (9); *In re Atkinson* (10); *In re Otway*. (11) With regard to the separate functions of the

(1) (1885) 10 App. Cas. 210.
(2) (1871) L. R. 6 Ex. 329.
(3) (1883) 11 Q. B. D. 674.
(4) (1810) 1 Rose, 151.
(5) (1816) 2 Rose, 424.
(6) (1826) 2 G. & J. 137.
(7) (1844) 3 Mont. D. & D. G. 505, 521.
(8) (1876) 3 Ch. D. 461.
(9) (1879) 12 Ch. D. 480.
(10) (1892) 9 Morrell, 193.
(11) (1895) 2 Manson, 174.

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judge and jury in actions of this nature, see *Bread* v. *Hare* (1): *Cotton* v. *James* (2); *Lister* v. *Perryman*. (3) The evidence given was sufficient to sustain appellant's case, but had been improperly withdrawn from the jury; and, moreover, evidence had been wrongly rejected. The registrar in refusing the petition had given a written judgment in which he found in favour of the appellant's indirect purpose; he also made a declaration that the appellant had not committed an act of bankruptcy in not complying with Hallen's notice. Not merely was the judgment held inadmissible, but oral evidence as to what took place before the registrar was rejected. It was contended that the registrar's judgment reported in New South Wales Bankruptcy Cases, vol. 6, p. 78, was admissible, being of a court of exclusive jurisdiction directly upon the point. Reference was made to *Flitters* v. *Allfrey* (4); *Needham* v. *Bremner* (5); *Ex parte Harper* (6); *Haddrick* v. *Heslop*. (7)

Reed, Q.C., *Shearman*, and *Easton*, for the respondent, contended that there was no evidence of want of reasonable and probable cause or of malice by or on behalf of the respondent in presenting the petition. At the time he presented it there was available to him a valid act of bankruptcy on the part of the appellant—a valid petitioning creditor's debt. No action would lie against him for exercising his available legal rights in the absence of fraud. Fraud is not made out merely by shewing an indirect motive. Reference was made to *Ex parte Wilbran* (8); *Ex parte Dennis* (9); *Re Sedgwick, Ex parte McMurdo*. (10) As to the rejection of evidence complained of, the registrar's judgment was immaterial, being upon points which he had no jurisdiction to determine. By s. 8, sub-ss. 2, 4, of the New South Wales Bankruptcy Act of 1887, which was practically the same as the English Act of 1883, s. 7, sub-ss. 2, 3, the registrar's jurisdiction is limited to granting or dismissing the petition. His reasons have been held in England

(1) (1839) 5 Bing. N. C. 722.
(2) (1830) 1 B. & Ad. 128.
(3) (1870) L. R. 4 H. L. 521.
(4) (1874) L. R. 10 C. P. 29.
(5) (1866) L. R. 1 C. P. 583, 585.
(6) (1875) L. R. 10 Ch. 379.
(7) (1848) 12 Q. B. 267.
(8) 5 Madd. 1; S. C. 1 Buck, 459.
(9) (1888) 60 L. T. 348.
(10) (1888) 60 L. T. 9.

to be inadmissible, as not constituting res judicata and in excess of jurisdiction, in *Ex parte Vitoria*. (1)

[They were stopped by their Lordships.]

Hamilton, replied.

The judgment of their Lordships was delivered by

LORD WATSON. The appellant, in August, 1896, brought the present action of damages against the respondent before the Supreme Court of New South Wales. The declaration sets forth that the respondent falsely and maliciously, and without reasonable or probable cause, presented a petition to the Judge in Bankruptcy, praying that a sequestration order might be made in respect of the estate of the appellant, according to the provisions of the New South Wales Bankruptcy Act of 1887, upon the allegation that the appellant had committed an act of bankruptcy, inasmuch as he did not comply with the requirements of a bankruptcy notice procured at the instigation of the respondent to be issued by one Alexander Hallen against the appellant; that the appellant shewed cause against the said petition, and disputed the commission of the said act of bankruptcy, and that the said petition was dismissed; that it was afterwards ordered by the Judge in Bankruptcy that the said bankruptcy notice should be set aside, and that it was thereupon declared by the judge that the said act of bankruptcy had not been committed by the appellant; that all proceedings in respect of said petition were, upon such dismissal and order and declaration as aforesaid, determined; and that the appellant had, by reason of the premises, been damaged in his business and otherwise. The declaration was met by a note of pleas and demurrer for the respondent, the terms of which it is unnecessary to recite.

Upon these pleadings the parties joined issue, and the case went to trial before Cohen J. and a jury on December 14, 1896, when three witnesses, including himself, were examined for the appellant. At the close of the appellant's evidence, the respondent moved for a nonsuit, which was allowed by the

(1) [1894] 2 Q. B. 389.

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presiding judge. On December 29, 1896, the appellant filed a rule nisi calling upon the respondent to shew cause why the nonsuit should not be set aside and a new trial granted. After hearing counsel for the appellant, the Court, by a majority, consisting of Darley C.J. and Owen J., refused the rule. Stephen J. was of opinion that the rule should be allowed to go on in order that the points raised might be more fully argued.

It appears from the evidence that the appellant, who had previously carried on business as a stevedore and wool presser, on August 2, 1893, entered into partnership for the term of five years with one William Collins, under the firm name of H. J. King & Co., for the purpose of carrying on the business of wool pressers, stevedores, and shipping agents at Sydney and elsewhere. By the contract of co-partnery it was stipulated that Collins should, if he thought fit, be at liberty to remain in his employment of shipping clerk in the office of the German Australian Steamship Company, and to accept any other similar position during the continuance of the partnership; and also that the appellant should have the active conduct of the business of the firm, and should receive a salary of 400*l.* per annum, payable in equal monthly instalments. The respondent was the manager of the German Australian Steamship Company. He was desirous of becoming a partner of the firm of H. J. King & Co., and it was in consequence of the refusal of his employers to allow him to accept that position that Collins became a partner. The respondent was also agent for one Ernest Wood, a merchant in London, who, on August 14, 1893, agreed to advance the sum of 500*l.* to the appellant and Collins in loan for behoof of the new firm. The advance was arranged by the respondent on Wood's behalf. It does not appear that any capital was contributed by the appellant; but Collins put into the business a sum of 200*l.*, which he borrowed from the respondent.

On March 17, 1894, the sum of 500*l.*, which Wood had agreed to lend to the firm, was paid to the appellant and his partner Collins; and upon the same day they executed a bill of sale to Wood of the plant, stock-in-trade, machinery, fixtures, and

book-debts of the firm in security of the loan. The appellant requested that the bill of sale should not be registered; and to that the respondent, as representing Wood, consented. Further advances were subsequently made to the firm by Mr. Wood through the respondent, the entire loan amounting, on March 26, 1896, to 1599*l.* 11*s.* 6*d.* On that date the firm agreed that the bill of sale of March 17, 1894, should extend to, and stand as security for, the whole loan then due to Mr. Wood.

In July, 1894, Charles Taylor, who was recommended by the respondent, became a member of the firm under an agreement with the appellant and Collins. He paid 1000*l.* into the firm, and in return received the right to one-eighth share and to a salary of 350*l.* per annum, payable by monthly instalments. During the following year there was some unpleasantness between the respondent and Mr. Collins, which resulted in the latter leaving the employment of the German Australian Company. Thereupon the respondent informed the appellant that Collins would have to leave the firm of H. J. King & Co., else he would not finance the business, and would "close down under his bill of sale." On June 5, 1895, Collins retired from the firm, his interest having been purchased by the appellant and his partner Taylor for the sum of 250*l.* In order to meet that payment the respondent advanced 100*l.* in cash to the firm, who gave Collins their promissory note for the balance of 150*l.* It was proposed at that time that, in consideration of his advance, the partners of the firm should hold at the disposal of the respondent part of the share in the business which they had purchased from Collins; but although the matter was discussed between the appellant and the respondent, the arrangement does not appear to have been carried into effect.

In the beginning of the year 1896 the firm of H. J. King & Co. was evidently not in a prosperous condition. Hallen, one of their employees, who, in April, 1895, had been injured on board a German ship which they were loading, recovered judgment against the appellant and Taylor for 341*l.* 18*s.* 9*d.* on February 20, 1896. The injured man had been insured by the firm, but the office with which the insurance was effected had

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gone into liquidation. After the judgment the appellant had interviews with the respondent, at some of which Taylor was present, the object and result of which are thus explained by the appellant in his evidence: "I wanted defendant to lend me more money, as he had done on many occasions. He declined. Defendant or Taylor proposed I should go out of H. King & Co. It was in the beginning of March. I had several interviews. I don't know anything was said about money. I was simply to go out of the business and get nothing. I declined. Defendant pressed me on many occasions to do this." On March 26, 1896, the respondent, acting on behalf of his constituent Mr. Wood, gave formal notice to the firm that in default of immediate payment of the sum of 1599*l.* 11*s.* 6*d.* then due to Mr. Wood he would take possession of the chattels and things comprised in the indenture of March 17. Default having been made, the respondent entered into possession. The appellant states in his evidence, "I did not consider the firm indebted to Wood in 1599*l.* odd"; but the statement can hardly be accepted, because the witness admits that the amount named stood in the books of the firm at the credit of Wood, and it is not disputed that on March 26, 1896, his partner Taylor executed on behalf of the firm an acknowledgment, which was indorsed upon the original bill of sale, to the effect that the debt then due to Wood amounted to 1599*l.* 11*s.* 6*d.* On March 30, 1896, the appellant sent a letter to the respondent making an offer (which was declined on the same day) to pay a specified sum as in full discharge of the liabilities of his firm. In that letter the appellant wrote that if the respondent could not see his way to accept the offer therein made to him, "I shall feel constrained to sequestrate the estate for the protection of the creditors."

On April 7, 1896, Hallen, under the provisions of the Bankruptcy Acts, 1887–1888, took out a bankruptcy notice against the appellant, requiring him to make payment of the sum of 341*l.* 18*s.* 9*d.*, for which he, Hallen, held a joint and several decree against the appellant and his partner Taylor, within seven days after service of the notice, excluding the day of notice. The notice was served on the appellant upon the following day, April 8. Their Lordships may observe that

there is no evidence beyond the following facts, which are not conclusive, tending to support the averment made by the appellant in his declaration to the effect that such notice by Hallen was procured or issued at the instigation of the respondent. The respondent, on April 2, 1896, gave to Sly & Russell, who conducted the present suit on his behalf in the Court below, his promissory note for 150*l.*, as an advance to Taylor, for whom they were then acting, in order to enable him to meet his liabilities under Hallen's decree. Sly & Russell, after correspondence with Hallen's solicitor in regard to the sum which would be accepted from their client, on April 8, 1896, indorsed the promissory note to him in satisfaction of Taylor's indebtedness.

No payment having been made by the appellant within the time prescribed by the notice, Hallen, on April 16, 1896, presented a petition for sequestration of his estate to the Judge in Bankruptcy, in which he set forth that the appellant was indebted to him in the sum of 191*l.* 18*s.* 9*d.*, being the balance of the sum of 341*l.* 18*s.* 9*d.* contained in the judgment aforesaid. On May 5, 1896, the appellant paid to Hallen the sum of 218*l.* 4*s.* 2*d.*, being in full of the balance of 195*l.* due by him, together with interest and costs. On May 11, 1896, Hallen, who had by that time received payment of his debt, with interest and costs, withdrew his petition for sequestration.

On May 8, 1896, the respondent, who was a creditor of the appellant for the sum of 260*l.* 10*s.* due by promissory note of February 12, 1896, filed in that capacity a petition for an order sequestrating the appellant's estate. The petition set forth that within six months before the date of its presentation the appellant had committed an act of bankruptcy, inasmuch as he had failed, within the period prescribed by the Act, after service of the bankruptcy order by Hallen on April 8, to comply with the requirements of the notice, or to satisfy the judge that he had a counter-claim, set-off, or cross-demand equal to or exceeding the amount of the judgment debt which he could not set up in the action in which the judgment was obtained. The petition was opposed by the appellant; and, on July 3, 1896, the Registrar in Bankruptcy, after hearing evidence, made an

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order to the effect that the petition of the respondent "be and the same is hereby dismissed out of this Court."

On August 7, 1896, Manning J., sitting as Judge in Bankruptcy, made an order in these terms: "Upon motion made to me this day on behalf of the above-named Hugh John King" (the present appellant), "and upon reading the bankruptcy notice herein dated the seventh day of April last, and the affidavits of the said Hugh John King and of Henry White sworn on the sixteenth and eighteenth days of May last, and there being no appearance for the judgment creditor, upon hearing Mr. Wise as counsel for the said Hugh John King: It is ordered that the said bankruptcy notice issued herein by the said Alexander Hallen on the said seventh day of April last past, be and the same is hereby set aside. And it is further declared that no act of bankruptcy has been committed by the said Hugh John King under the said notice of the said seventh day of April last past." From the terms of the foregoing order, it is obvious that the respondent was no party to these proceedings; and it is not wonderful that Hallen, the judgment creditor who took out the notice, should not have appeared in them, seeing that he had obtained full payment of his debt with costs more than two months previously. Independently of these considerations, their Lordships are of opinion that the order of the learned judge, in so far as it declares that no act of bankruptcy had been committed by the appellant, went beyond his jurisdiction, and was unwarranted by the Bankruptcy Acts of the Colony. These Acts define with great minuteness the various ways in which an act of bankruptcy may be constituted, one of them being by a bankruptcy notice under s. 4, sub-s. 2, of the principal Act. When an application is made for a sequestration order which complies with the requirements of ss. 6, 7, and 8 of the same Act, ample discretion is vested in the judge either to grant or refuse the petition; and, if a sequestration order be made, it may subsequently (s. 5, (ii.)) be discharged or annulled. But, whilst the judge may in his discretion competently refuse to follow up an act of bankruptcy by issuing a sequestration order, the statutes give him no jurisdiction to annul an act of bankruptcy, or to declare

that it never was committed. There is no authority to be found for the procedure of the learned judge save in the 51st of the General Rules framed by the Court, which provides that "When the judge makes an order setting aside the bankruptcy notice, he may at the same time declare that no act of bankruptcy has been committed by the debtor under such notice." Now the only power which the Court has to frame rules is conferred by s. 119 of the principal Act, and it is strictly limited to rules "for the purpose of regulating any matter under this Act." In the opinion of their Lordships, a rule empowering the judge to make a declaration that no act of bankruptcy had been committed under the notice is in no sense a regulation either framed or calculated to carry out the objects of the Act. It is, in their opinion, the new creation of a jurisdiction which the Legislature withheld, it is inconsistent with and so far repeals the plain enactments of the statute, and it takes away from creditors the absolute right which the statute gave them of founding a petition for a sequestration order upon the bankruptcy notice.

Upon the hearing of this appeal, it was maintained for the appellant that the orders of the Court below ought to be reversed, and the action remitted for new trial, upon two separate grounds, the first of these being that certain documentary evidence had been unduly rejected by the presiding judge; and the second, that the learned judge, instead of directing a nonsuit, ought to have submitted to the jury certain issues which were only fitted for their consideration. Their Lordships do not think that either of these objections, which they will notice in their order, is well founded.

At the trial, the decision of the registrar, dated July 3, 1896, dismissing the respondent's petition for an order sequestrating the appellant's estate, was admitted without objection. But an objection was taken when the appellant's counsel tendered in evidence "the full written judgment" delivered by the registrar on that occasion. The document thus tendered was, in their Lordships' opinion, rightly rejected by the presiding judge. Sect. 8, sub-ss. 2 and 4, of the New South Wales Act of 1887, give the registrar no jurisdiction except to grant or to

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dismiss a creditor's petition for sequestration. The terms of that clause and of these sub-sections are substantially the same with those of s. 7, sub-ss. 2 and 3, of the English Bankruptcy Act, 1883; and it was held by the Court of Appeal in *Ex parte Vitoria* (1) that the decision of the registrar, affirming the insufficiency of the petitioning creditor's debt, did not constitute res judicata. Lord Esher M.R. observed: "all that he" (i.e. the registrar) "can do is, to refuse to make a receiving order in respect of the judgment debt. That is the limit of his discretion. That being so, the case does not come within the doctrine of res judicata at all." In their Lordships' opinion, these observations are equally applicable to the statute of New South Wales. The order made by the registrar on July 3, 1896, is very properly confined to a simple dismissal of the respondent's petition. The reasons by which he was influenced, or which he may have thought fit to assign in delivering judgment, are immaterial, because they could not raise an estoppel against the respondent; and the document tendered, if it had been admitted, would have amounted to nothing more than hearsay evidence of the opinion of an individual upon points which he had no jurisdiction to determine.

In support of his other and more serious objection to the conduct and result of the trial, the appellant's counsel mainly relied upon the evidence as shewing or tending to shew that, in presenting his petition for a sequestration order, the respondent was actuated, not by an honest wish to secure payment of the debt which the appellant owed him, but by a desire to effect the exclusion of the appellant from the firm of H. J. King & Co. He maintained that the respondent's resort to sequestration in bankruptcy, with that motive and with that object, constituted an abuse of the process of the Court and a fraud, and that the judge ought in some form to have remitted to the jury the question whether the respondent had been guilty of such abuse and fraud, with the direction that, in the event of their answering the question in the affirmative, they ought to return a verdict for the appellant.

(1) [1894] 2 Q. B. 387.

Their Lordships do not dispute the soundness of the proposition that a plaintiff or petitioner who institutes and insists in a process before the Bankruptcy or any other Court, in circumstances which make it an abuse of the remedy sought or a fraud upon the Court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or as fraud upon the Court. In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shewn that, in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable.

In *Ex parte Gallimore* (1) a tenant moved to set aside a commission of bankruptcy, issued at the instance of his landlord, upon two grounds: (1.) that he was not a trader within the meaning of the statutes then in force; and (2.) that the commission had been taken out by his landlord, contrary to the good faith of their mutual contract, with the object of determining his mineral lease. The Lord Chancellor (Lord Eldon) directed issues to try the question whether the applicant was a trader. With regard to the second ground upon which the motion was based, the noble and learned Lord, in giving judgment, observed: "I see no reason why the process in bankruptcy should not be affected by the same species of fraud which would affect and set aside any other process in any other Court." In the subsequent case of *Ex parte Wilbran* (2), which depended before the Vice-Chancellor (Sir John Leach), a mercantile firm who were creditors of another firm arrested its individual partners, all of whom put in bail with the exception of Wilbran, who remained in prison for two months, when he was made bankrupt by the incarcerating creditors. Wilbran then petitioned to supersede the commission, on the ground that it had been unfairly used for the purpose of dissolving the

(1) 2 Rose, 424. (2) 5 Madd. 1.

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partnership in so far as he was concerned. The petition was opposed by the creditor firm, who did not apparently dispute the fact that they desired and intended to put an end to Wilbran's connection with his firm, but pleaded that such motive was not a ground of interference either on general equity, or as an abuse of the commission. Sir John Leach, after conferring with the Lord Chancellor, dismissed the petition. His Honour said, "that a commission was, in a qualified sense, a legal right, like an action, and that courts of justice had no concern with the motives of parties who asserted a legal right. In *Ex parte Harcourt* (1) the bankrupt himself, with a view to dissolve the partnership, procured a commission to be issued against him. Being the bankrupt's commission it could not stand. In *Ex parte Gallimore* (2) the commission was used for a fraudulent purpose. He fully adopted the principle of these cases. Here it appeared that the petitioning creditors, having no concert with the other partners, desired to operate a dissolution, considering it an advantageous measure for them that the bankrupt should not continue in a firm with which they had large dealings. There was, in this, no fraud, and it is not enough that there be a by-motive, unless there be fraud."

The very intelligible principle which was recognised in *Ex parte Wilbran* (3) does not appear to their Lordships to have been departed from in any of the subsequent decisions which were brought under their notice by the industry of the appellant's counsel. Motive cannot in itself constitute fraud, although it may incite the person who entertains it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result; and it is not the motive, but the course of procedure which leads to that result, which the law regards as constituting fraud. In *In re Davies* (4) the Court of Appeal refused to make an adjudication in bankruptcy, where it was clearly shewn that the proceeding had been used and was meant to be used for the illegitimate and fraudulent purpose of extorting money from the debtor. And, again, in *Ex parte Griffin* (5),

(1) (1815) 2 Rose, 203.
(2) 2 Rose, 424.
(3) 5 Madd. 1.
(4) 3 Ch. D. 461.
(5) 12 Ch. D. 480.

the same Court, although there was a good petitioning creditor's debt, and an act of bankruptcy had been committed, refused to make an adjudication. The ratio of the decision was thus explained by James L.J.: "I think I never knew a case so transparent as to the fraud with which the whole thing was conceived, and the oppression which it was intended to exercise. It would, I think, be a shocking thing for any court of justice in a civilised country to be made the instrument of proceedings like these."

Counsel for the appellant argued, with great plausibility, that on the trial of a case like the present, involving the inquiry whether the proceedings complained of were taken without reasonable and probable cause, it is within the province of the jury, and not of the judge, to find the facts upon which the question of probable cause depends, and that it is for the judge upon these facts to determine the question of law. The rule was so laid down by the House of Lords in *Lister* v. *Perryman*. (1) Their Lordships admit the propriety and cogency of the rule in any and every case where the facts admit of its application. But it appears to them that the circumstances of the present case, as these are disclosed in the evidence of the appellant, are very different in their character from the facts, as appearing in the evidence, with which noble and learned Lords had to deal in *Lister* v. *Perryman*. (1) It certainly is not the duty of the presiding judge to submit any issue of fact to the jury which is not fairly raised by the evidence. There is, no doubt, evidence by the appellant tending to shew that the respondent, in petitioning for a sequestration order, was influenced by a desire to get the appellant out of the firm of H. J. King & Co. But their Lordships have been unable to find in the evidence any fact or circumstance calculated to raise the question whether, in petitioning for sequestration of the appellant's estate, the respondent had committed a fraud upon the law or upon the Court; and, in their opinion, the learned judge would not have been justified in raising such an issue, even if he had been invited to do so.

Their Lordships are satisfied that, in point of fact, no such

(1) L. R. 4 H. L. 521.

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issue was raised by the appellant in either of the Courts below. There is no reference to it in the note made by the presiding judge of the argument of the appellant's counsel against the respondent's motion for a nonsuit; and, what is of more importance, it is not raised in the memorandum for a rule nisi which was filed by the appellant. In that document it is pleaded (art. 7) that the learned judge ought to have ascertained by the verdict of the jury whether the respondent presented his bankruptcy petition for the concealed purpose of forcing the appellant out of the partnership of H. J. King & Co.; and also (art. 11) ought to have directed the jury that "the presentation of a petition for an ulterior private purpose other than the equal distribution of a debtor's assets is a fraud upon the Court of Bankruptcy." A direction in these terms would, according to their Lordships' opinion, have been clearly erroneous. A desire and intention on the part of the petitioning creditor to terminate a partnership connection between the debtor and a firm which owed money to him and to Mr. Wood, whom he represented as agent, is simply a by-motive, which would not taint his procedure unless there were proof of positive fraud, which is absent in this case. It was not necessary for the learned judge to submit any question to the jury as to the alleged motive of the respondent, because, on the assumption that it did exist, which has never been seriously disputed, there are no legal grounds for coming to the conclusion that the respondent had acted without reasonable and probable cause.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed from. The appellant must pay to the respondent his costs of this appeal.

Solicitors for appellant: *Clapham, Fitch & Co.*
Solicitors for respondent: *Snow, Snow & Fox.*

[PRIVY COUNCIL.]

CANADA SUGAR REFINING COMPANY, LIMITED . . . . . } DEFENDANTS

AND

THE QUEEN . . . . . PLAINTIFF.

J. C.* 1898 July 8, 12, 27.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of Canada—Customs Tariff Act, 1894, s. 4—*R. S. C.* (1886), c. 32, s. 150 —*Construction—Date of Importation of Goods.*

Held, that by the true construction of the Customs Tariff Act, 1894, s. 4, as amended by the Tariff Act, 1895, which in effect directs that duty be paid upon raw sugar "when such goods are imported into Canada or taken out of warehouse for consumption therein," the date at which duty both attaches thereto and becomes payable is when the goods are landed and delivered to the importer or to his order, or, when they are taken out of warehouse, if instead of being delivered they have been placed in bond.

Sect. 150 of the Customs Act, 1886, which directs that the precise time of the importation of goods shall be deemed to be the time when "they came within the limits of the port at which they ought to be reported," refers on its true construction to the port at which the goods are to be landed—that is, where the effective report is to be made. Such construction is required in order to place a consistent, rational, and probable meaning on the context and other clauses of the Act.

APPEAL from a decree of the Supreme Court (May 1, 1897) reversing a decree of the Exchequer Court of Canada (Sept. 14, 1896), and adjudging that Her Majesty was entitled to recover from the appellants the sum of $39,937 with costs, claimed as duty payable by the appellants on raw sugar imported by them from Hamburg into Canada in the SS. *Cynthiana*.

The questions under the circumstances related in their Lordships' judgment were:—

(*a*) Was the said sugar imported into Canada within the meaning of the Customs Tariff Act before May 3, 1895, on which day the statute 58 & 59 Vict. c. 23, imposing the said duty, came into force?

(*b*) Does the fact that an entry of the said sugar was, under the circumstances detailed, made at the Customs on May 2,

* *Present:* LORD WATSON, LORD HOBHOUSE, and LORD DAVEY.

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1895, as if the said sugar were free from duty, in the circumstances of this case prevent the Crown from subsequently claiming the duty?

Bray, Q.C., and *Gormully, Q.C.*, for the appellants, contended that the judgment of the Supreme Court was wrong. They referred to Customs Tariff Act, 1894 (57 & 58 Vict. c. 33), s. 4; the Customs Act (49 Vict. c. 32), s. 150, as amended by 52 Vict. c. 14, s. 12; to ss. 25, 31, and 34. They contended that on the true construction of those enactments the importation in question took place when the *Cynthiana* came within the limits of the Port of North Sydney, when the master was bound to make his report pursuant to s. 25 of the Customs Act. Otherwise it took place at the latest on May 2, when the appellants made entry of their sugar at Montreal, and their entry, whether regular or irregular, was in fact accepted by the Customs House authorities as of goods which were duty free. The language of 58 & 59 Vict. c. 23, s. 4, is not wide enough to reach retroactively transactions which were fully completed and concluded before the passage of the said statute, which was not until July 22.

Blake, Q.C., Hon. C. Fitzpatrick, S.-G., Newcombe, Q.C., and *Loehnis*, for the respondent, contended that the sugar in question was not imported into Canada within the meaning of the Customs Act till the *Cynthiana* had arrived within the limits of her port of destination, which was Montreal. The date of the ship's arrival within those limits was May 4. Until then no duties could be either levied or paid. The duty attached and was payable on that date. As regards the general practice at Montreal as to entering goods before arrival, that did not alter the date of actual arrival, which alone is the material date for the purposes of the Customs Acts. The free entry on May 2 was an erroneous entry, and was properly cancelled as not binding on the respondent in respect of this claim. Reference was made by way of illustration to *The Patria* (1); *Mackay* v. *Commercial Bank of New Brunswick*. (2)

Bray, Q.C., replied.

(1) (1871) L. R. 3 A. & E. 459. (2) (1874) L. R. 5 P. C. 411.

1898. July 27. The judgment of their Lordships was delivered by

LORD DAVEY. The action out of which this appeal arises was commenced by information of the Attorney-General of Canada against the appellants in the Exchequer Court of Canada to recover a large sum for duties on raw sugar imported by the appellants into Canada by the steamship *Cynthiana*. The decision of the Exchequer Court was in favour of the appellants, but their judgment was reversed by the Supreme Court, King and Girouard JJ. dissenting. The appeal is by special leave from the judgment or order of the latter Court, dated May 1, 1897.

The principal question in the case is the date of the "importation" of the sugar, and that question depends on the construction and effect to be given to the Customs Tariff Acts and certain sections of the Customs Acts.

The Customs Tariff Act, 1894 (57 & 58 Vict. c. 33), enacted as follows:—

"Sect. 4. Subject to the provisions of this Act and to the requirements of the Customs Act c. 32 of the Revised Statutes as amended there shall be levied collected and paid upon all goods enumerated or referred to as not enumerated in Sched. A to this Act the several rates of duties of customs set forth and described in the said schedule and set opposite to each class respectively or charged thereon as not enumerated when such goods are imported into Canada or taken out of warehouse for consumption therein."

In accordance with Sched. A referred to in this section raw sugar of the same description as that which formed the cargo of the *Cynthiana* could be imported free. But by the Tariff Act, 1895 (58 & 59 Vict. c. 23), Sched. A to the previous Act was amended, and a duty of one-half per cent. per pound was imposed upon that description of sugar. By s. 4 of the Act of 1895 it was enacted that the Act should be held to have come into force on May 3, 1895.

Many sections of the Customs Act, 1886 (49 Vict. c. 32), and the subsequent amending Acts were referred to in the course of the argument. The more important for the present purpose

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are ss. 25, 31, 34, and 150, which, so far as material, are as follows :—

"Sect. 25. The master of every vessel coming from any port or place out of Canada, or coastwise, and entering any port in Canada, whether laden or in ballast, shall go without delay, when such vessel is anchored or moored, to the custom house for the port or place of entry where he arrives, and there make a report in writing to the collector, or other proper officer, of the arrival and voyage of such vessel, stating her name, country, and tonnage, the port of registry, the name of the master, the country of the owners, the number and names of the passengers, if any, the number of the crew, and whether the vessel is laden or in ballast, and, if laden, the marks and numbers of every package and parcel of goods on board, and where the same was laden, and the particulars of any goods stowed loose, and where and to whom consigned, and where any and what goods, if any, have been laden or unladen, or bulk has been broken during the voyage, what part of the cargo and the number and names of the passengers which are intended to be landed at that port, and what and whom at any other port in Canada and what part of the cargo, if any, is intended to be exported in the same vessel, and what surplus stores remain on board—as far as any of such particulars are or can be known to him."

"Sect. 31. If any goods are brought in any decked vessel, from any place out of Canada to any port of entry therein, and not landed, but it is intended to convey such goods to some other port in Canada in the same vessel there to be landed, the duty shall not be paid or the entry completed at the first port, but at the port where the goods are to be landed, and to which they shall be conveyed accordingly under such regulations and with such security or precautions for compliance with the requirements of this Act as the Governor in Council from time to time directs."

"Sect. 34. Every importer of goods by sea or from any place out of Canada shall within three days after the arrival of the importing vessel make due entry inwards of such goods and land the same."

"Sect. 150 (as amended by 52 Vict. c. 14, s. 12). Whenever,

on the levying of any duty, or for any other purpose, it becomes necessary to determine the precise time of the importation or exportation of any goods, or of the arrival or departure of any vessel, such importation, if made by sea, coastwise or by inland navigation in any decked vessel, shall be deemed to have been completed from the time the vessel in which such goods were imported came within the limits of the port at which they ought to be reported, and if made by land or by inland navigation in any undecked vessel, then, from the time such goods were brought within the limits of Canada."

There is no dispute as to the facts of the case. The *Cynthiana* sailed from Antwerp with a general cargo, including the sugar in question, consigned to Montreal. On April 29, 1895, the vessel put into the Port of North Sydney in Cape Breton, Canada. It was stated that she put into that port in order to coal, but there was no evidence on this point or whether she was bound to call there. On her arrival at North Sydney the master made his report inwards of his ship and cargo in compliance with s. 25 of the Customs Act, and on the same day made his report outwards, and obtained the Customs certificate of clearance for Montreal. The *Cynthiana* reached her wharf in the Port of Montreal between 5 and 6 P.M. on May 4, 1895, and it is agreed that she did not come within the limits of that port until after May 3, 1895.

It should be mentioned that on May 2, 1895, and therefore before the arrival of the vessel, the appellants, who were the importers of the sugar, made entry at the Montreal Customs House of the goods, and a landing warrant was issued for the landing thereof as duty free. It was stated that this was done in accordance with a common practice at the Port of Montreal. However, on May 14 the Collector of Customs cancelled the free entry, claiming that the goods were liable to duty, and detained such portions of the sugar as then remained in the possession of the appellants.

On these facts it was contended for the appellants that the importation of the sugar was complete on the arrival of the vessel at North Sydney, and as that event took place before May 3 the sugar was free from the duty imposed by the Tariff

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Act, 1895. It was also contended in the alternative that the importation took place at the latest on May 2, when the appellants made entry at Montreal, and such entry was accepted by the Customs authorities. The latter point, however, was not seriously pressed by the learned counsel for the appellants, and it is clear that the Crown was not estopped by the irregular act of the Customs officer from claiming the duty if it was payable.

On the other hand, it was contended that the goods were not "imported," within the meaning of the Tariff Act, until they were landed or, at any rate, arrived within the limits of the Port of Montreal, and that, having regard to the context and other sections of the Act, the words "the port at which they ought to be reported," in s. 150 of the Customs Act, mean the port at which the effective report is to be made for the purpose of the importation.

The real question, of course, is whether the sugar was "imported" within the meaning of s. 4 of the Tariff Act, 1894, before or after May 3, because it is by that section as amended by the Act of 1895 that the duty is imposed. By the provisions of s. 4 the duties are to be "levied, collected, and paid" (which means nothing more than paid) upon the enumerated goods "when such goods are imported into Canada or taken out of warehouse for consumption therein." Their Lordships make the following observations upon this language: (1.) The imposition of the duties is contained only in the direction for their payment. There are no words which render the goods liable for the duty or make the duty (as it is said) attach at any date prior to the date of payment. (2.) The words "when such goods are imported into Canada" express the time at which the duties are to be paid. If therefore the goods are imported into Canada when the vessel enters a port of call on her way to her ultimate destination, the duties would be payable at that date, which is highly improbable, and contrary to the express provisions of s. 31. (3.) The duties are payable at one of two dates —either the date of importation or the date when they are taken out of warehouse. There is no real contrast between the date of arrival at a port of call and the date when the goods are

taken out of warehouse, because if the words mean in the first case that the duty attaches when the vessel arrives at a port of call, it must equally do so whether on arrival at the port of discharge they are delivered to the importer or warehoused in bond. The true contrast is that which their Lordships have just indicated, and the words appear to them to mean—when the goods are landed and delivered to the importer or to his order, or when they are taken out of warehouse, if instead of being delivered they have been placed in bond. (4.) The result is that, in the opinion of their Lordships, the words "imported into Canada" must, in order to give any rational sense to the clause, mean imported at the port of discharge, and cannot be used in the sense attributed to the word "imported" by the appellants, in accordance with the construction placed by them on the definition in s. 150 of the Customs Act. (5.) If the goods were "imported," within the meaning of the Tariff Act, on or after May 3, (in other words) if the duty became payable after that date, the Crown was entitled to it.

But their Lordships do not find it necessary to adopt the appellants' construction of s. 150. Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject-matter. Their Lordships think that the "report" spoken of in s. 150 may well mean the report to be made by the master under s. 25 completed by the entry to be made by the importer under s. 34. According to this construction, the port spoken of in s. 150 would be the port at which the goods are to be landed mentioned in s. 31. And this construction appears to their Lordships to place a consistent, rational, and probable meaning on the whole of the sections referred to when read together. The report made by the master at the port of call, or at any port which he enters, for any purpose other than that of discharging his cargo, is no doubt useful for the purpose of checking what may be called the effective report to be made on arrival at the port of discharge. The object of the definition in s. 150 is not to define the port of importation, or the meaning of "imported," but

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the time when the goods are to be deemed to be first imported. The words in question apply equally to importation coastwise, or by inland navigation, in any decked vessel. If made by land or by inland navigation in any undecked vessel, then the time is when such goods are brought within the limits of Canada. This is probably because goods conveyed by land would not be, and goods conveyed by small undecked vessels probably would not be discharged at a port of entry within the meaning of the Act. The distinction between goods brought in decked and undecked vessels or vessels of small size runs through the whole Act.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Nicol, Son & Jones.*
Solicitors for respondent: *Day, Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1898 *July* 13, 26.

KERRY AND OTHERS . . . . . DEFENDANTS;

AND

ENGLAND . . . . . PLAINTIFF.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Practice—New Trial—Verdict—Judgment.

Where a jury found (1.) that the death of the plaintiff's wife had been accelerated, but not to any appreciable extent, by taking a dose of tartar emetic negligently supplied by the defendants; (2.) that the plaintiff had suffered no damage thereby, but that his minor child had incurred damage to the extent of $1000:—

Held, that the action must be dismissed, because the damages attributable

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* *Present:* LORD HERSCHELL, LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR HENRY STRONG.

to the defendants were on those findings (which could not properly be disturbed) inappreciable and irrecoverable.

The Court of Queen's Bench was in error in directing a new trial on the assumption that the findings as to damages are contradictory and illogical.

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APPEAL from a decree of the Court of Queen's Bench (Sept. 21, 1897) reversing a decree of the Superior Court for Lower Canada sitting in review at Montreal (Nov. 20, 1896).

The facts are stated in the judgment of their Lordships.

Haldane, Q.C., and *Brosseau*, for the appellants.
Wallace, Q.C., and *McGoun*, for the respondent.

1898
July 26.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The defendants in this suit, now appellants, carry on the business of wholesale druggists in Montreal. The plaintiff, now respondent, is a physician in the same city. On February 8 or 9, 1894, Mrs. England, wife of the plaintiff, had an attack of influenza, and wanted to take bismuth for it. Dr. England thereupon applied to Messrs. Dart & Co., druggists in Montreal, for two ounces of that material; and they sent him a packet purporting to contain subnitrate of bismuth. Mrs. England took some, and immediately felt that there was something wrong. It turned out that she had taken tartar emetic or antimony. On February 19 she died. Dart & Co. informed the plaintiff that the stuff supplied by them to him was part of a larger quantity supplied to them by the defendants as subnitrate of bismuth.

On January 25, 1895, the plaintiff sued the defendants for damages on the ground of negligence. He sued not only in person for his own loss, but also as tutor to his minor son for the loss accruing to him, alleging that each had suffered damage to the amount of $20,000. On February 26, 1896, Archibald J., having previously settled a number of questions to be put to the jury, proceeded to try the case. The questions material to the present appeal, with the answers of the jury, are as follows:—

"3rd. Was the death of said Carrie Ann Galer caused by her taking a dose of tartar emetic in mistake for subnitrate of

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bismuth, on or about the 9th day of said month of February?—It was accelerated, but not to any appreciable extent.

"4th. Was the said tartar emetic supplied to the plaintiff by Henry J. Dart & Company, druggists, upon an order for bismuth, and was the package in which the same was contained marked 'Bismuth Sub-nit, 2 ounces'?—Yes."

"6th. Was the supply of the said tartar emetic in said package marked 'Bismuth Sub-nit' by the defendants to the said Henry J. Dart & Company due to neglect, carelessness, want of skill, and fault of the defendants or their employees?—Yes."

"8th. At the time of the administration of the dose mentioned in question 3, and previous thereto, was the plaintiff's wife suffering from an illness known as 'La Grippe'?—Yes.

"9th. Was the death of plaintiff's wife caused by last-mentioned illness or by disease, independently of said dose of tartar emetic?—From previous disease, but accelerated by the tartar emetic.

"10th. Has the plaintiff suffered any damages by reason of the death of the wife, and if so, to what amount?—No.

"11th. Has the plaintiff's minor child suffered any damages by the death of his mother, and if so, to what amount?—Yes. $1000, one thousand dollars.

"E. A. Whitehead, Foreman."

On April 13, 1896, the plaintiff moved for a new trial on grounds relating to the 3rd and 9th questions. As to question 3:—

"The said answer is inconclusive and inconsistent, and in so far as the same states that the death of the late Dame Carrie Ann Galer was not accelerated to an appreciable extent by the taking of the said dose of tartar emetic, the said answer is unsupported by proof, and is contrary to the evidence adduced.

"The answer to the 9th question, in so far as it purports to shew that the death of the plaintiff's wife was caused by previous disease, is unsupported by proof, and is contrary to evidence adduced."

There are other grounds which need not be stated. At the same time the defendants moved in arrest of judgment, and

also to dismiss the action, notwithstanding the verdict returned in favour of the plaintiff as tutor to his son.

On November 20, 1896, the Superior Court sitting in review granted the motion of the defendants, and dismissed that of the plaintiff, and also dismissed his action with costs. The ground assigned by them was want of privity (lien de droit) between defendants and plaintiff. Archibald J., the trial judge, one of the three who sat in the Court of Review, did not dissent from this judgment; though at the same time he stated that in his opinion the jury's answer No. 3 was contrary to the evidence, and that it would be to the interest of justice to order a new trial in order that the important question of law might be put in due course of decision.

On appeal by the plaintiff the Court of Queen's Bench quashed the judgment of the Court of Review, and, dismissing both of the defendants' motions, ordered a new trial. The formal motives introductory to their order may be thus expressed. There exists a lien de droit between the parties. And as in the answers of the jury it is declared that the plaintiff personally has suffered no damage, but that his son has suffered damage to the extent of $1000, there is a contradiction neither explained nor justified by the evidence, and the answers cannot form a logical basis of a judgment justified by evidence.

The reasons of the learned judges were expressed by Bossé J. He states fully the grounds on which the Court differs from the Court of Review on the question of privity. Then, turning to the grounds assigned for new trial, he says the fact that the jury differ from the judge presiding at the trial or from the appeal judges is not sufficient, but that the verdict must be without any foundation, and so opposed to the evidence that it can only be explained by some motive other than the desire to do justice. In this case there are contradictions in the evidence touching the death of Mrs. England, and the acceleration of that death, but, whatever might be their opinion on those two points, they thought it competent for the jury to come (le jury a pu en arriver) to the conclusion to which it had come. He then adverts to the contradiction stated in the formal motives for the order, and proceeds. The position is made more difficult

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by the fact that plaintiff has not moved for judgment of $1000 according to the verdict. If the new trial for which alone he moved is refused, the result will be, as regards the father, no damages, and as regards the son, the damages awarded. That result, he says, will not be logical, because it will be contradictory as between the two plaintiffs.

Their Lordships are not called upon to pronounce any opinion as to the question of privity, nor has it been argued at the bar. It may be assumed on this occasion and for the purpose only of this judgment that a lien de droit has been established between the parties. The question is whether any right to damages by the complaining parties has been established by the findings of the jury. The sole reason assigned for ordering a new trial is that the findings of the jury, Nos. 10 and 11, are contradictory and illogical. Their Lordships cannot see the contradiction. What the jury find is that Dr. England suffered no damage by reason of the death of his wife, while his son suffered thereby to the amount of $1000. Why should not those two findings stand together? They may be wrong or against evidence, but that is not the ground taken for the new trial. It is easily conceivable that the death of a woman may cause pecuniary loss to her child and none to her husband; and that is what the jury have found.

Their Lordships cannot agree with the learned judges that the jury have awarded $1000 to the boy. They have awarded nothing. It is common enough to take the opinion of a jury as to the amount of damage suffered, leaving it for the Court to say whether on all the facts of the case the plaintiff can recover it from the defendant. That is the effect of the proceedings at this trial. If the findings do not establish the requisite connection between the defendants and plaintiffs, as held by the Court of Review, no damage can be recovered. If they do, as the Court of Queen's Bench hold, there ought to be a judgment for such damages as the other findings justify, and for no more. As the jury have found that the death of Mrs. England was not accelerated by the poison to any appreciable extent, it follows as a legal consequence that the damage attributable to the defendants is inappreciable. It cannot be

appreciable for the boy any more than for his father. As regards the father, he suffered no pecuniary loss by the death of his wife; the son suffered loss estimated at $1000, but the extent to which the defendants have caused it is inappreciable; or, in other words, is nothing at all which a court of justice can recognise. No damages being recoverable, it is right to dismiss the action as the Court of Review has done.

A large part of the argument for the plaintiff was taken up with an attempt to displace findings Nos. 3 and 9 on the ground that they are against evidence, and their Lordships' attention was called in detail to the evidence on the point. They do not feel it necessary to comment on it in detail. They agree entirely with the position taken by the Court of Queen's Bench: that whatever might be the opinion they would form if they were the jury, the conclusion to which the jury have come was quite open to them on the evidence, and cannot properly be disturbed.

Their Lordships will humby advise Her Majesty to discharge the order appealed from with costs, and to restore that of the Court of Review. The respondent must pay the costs of this appeal.

Solicitors for appellants: *Simpson & Co.*
Solicitors for respondent: *Thomas White & Sons.*

[PRIVY COUNCIL.]

J. C.* 1898 July 15; Aug. 3.

BARKER . . . . . PLAINTIFF;

AND

EDGER AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—Poututu Jurisdiction Act, 1889—*Effect of Proceedings in the Validation Court—Native Land Courts Acts*, 1886 *and* 1888—*Jurisdiction to rehear—Right of Appeal.*

The presumption is that a subsequent general enactment is not intended to interfere with a special enactment, unless the intention so to do is very clearly manifested:—

Held, that current proceedings in the Native Land Court under a specially enabling Act called the New Zealand Poututu Jurisdiction Act, 1889, were not stayed by the commencement of proceedings in the Validation Court; notwithstanding the general provision contained in the Act establishing the latter Court to the effect that commencement of proceedings therein shall operate as a stay of proceedings in any other Court in respect of the same matters:

Held, also, that the jurisdiction to rehear—that is to entertain an appeal—given by the Native Land Courts Acts of 1886 and 1888 is not confined to cases where the title to particular land has been the only question decided by the Court of First Instance; but extends to cases where the decision is embodied in the same decree with other matters not of an appealable nature.

Under the special Poututu Act orders as to title to land are also appealable in the same way; and *held* accordingly that the appellant was entitled thereunder to a rehearing of judgments concerning the title to Poututu lands, and that the Native Land Court had jurisdiction to grant such rehearing, proceedings therein not being stayed by the respondents' commencement of proceedings in the Validation Court.

APPEAL from a judgment of the Court of Appeal (April 27, 1896) affirming a judgment of the Supreme Court of New Zealand (Northern District, Nov. 18, 1895).

The principal question of law raised was whether the judgments of the judge sitting under the Poututu Jurisdiction Act, 1889, were final and conclusive, or whether there is jurisdiction to order a rehearing of cases the subject of those judgments.

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR HENRY STRONG.

J. C. 1898 BARKER v. EDGER.

The facts are stated in the judgment of their Lordships.

The first Court and two judges of the Appeal Court held that the special Act did confer on the Native Land Court sitting at Gisborne full jurisdiction to settle the whole of the litigation in question and to make orders and decrees which should be final and conclusive and binding upon all the parties. The Chief Justice, however, thought that s. 3 gave the Native Land Court power to rehear claims adjudicated upon by the Court sitting under the provisions of the special Act.

Cohen, Q.C., and *Northcote*, for the appellant.

Mattinson, Q.C., and *Acland*, for the respondent Tucker.

1898 *Aug.* 3.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. The questions raised in this appeal concern the jurisdiction and procedure of the Native Land Court of New Zealand. The plaintiff, now appellant, seeks a mandamus directed to two judges and two assessors of that Court requiring them to hear and determine a matter depending before them, and also seeks an injunction to restrain the other respondents from proceeding with claims made by them in the Validation Court. He is met by two objections. One is that the proceedings in the Validation Court have ousted the jurisdiction of the Native Land Court. The other is that the matter pending in the Native Land Court is one which by the constitution of that Court itself is incompetent to it, being a rehearing of judgments given by the Judge of First Instance.

The constitution of the Native Land Court is regulated by two Acts of Parliament passed in 1886 and 1888. It was established mainly for the investigation and determination of titles to "native land." Certain terms which enter into this discussion are by s. 2 of the Act of 1888 defined as follows:—

"'Native' means an aboriginal native of New Zealand and includes half-castes and their descendants.

"'Land' means any land in the colony owned by natives except native land.

"'Native land' means land in the colony owned by natives

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under their customs or usages, but of which the ownership has not been determined by the Court.

"'Person' includes a person whether native or otherwise."

There are a number of sections relating to the important subject of partition. Sect. 75 of the Act of 1886 runs as follows:—

"As to partition it shall be lawful for any person, and as to other business it shall be lawful for any native, who feels himself aggrieved by the decision of the Court, or for the Governor to apply for a rehearing provided the application be made within three months after such decision is given. Such application shall be made to the chief judge in writing."

This rehearing is in effect an appeal, because by s. 24 of the Act of 1888 it is enacted that it shall be determined by a Court of not less than two judges and one assessor, none of whom shall have adjudicated on the case at any former time. A decision on a rehearing is final and conclusive (s. 78 of the Act of 1886).

In the year 1889 was passed the Poututu Jurisdiction Act, under which the present controversy arises. It is one of the Acts which have been passed for bringing within the jurisdiction of the Native Land Court subject-matter not contemplated by the principal Act of 1886. The recital and ss. 2 and 3 must be read at length. The recital is:—

"That there was then pending in the Native Land Court sitting at Gisborne an inquiry into the rights of several parties, natives and Europeans, claiming interest in certain blocks of land known as Poututu A, B, and C Gisborne District, and that there were involved in the said litigation the interests of other parties not then before the Court, both Europeans and natives, claiming adversely to the aforesaid parties, and also some of them claiming interests in other blocks described in a certain deed dated the 23rd June, 1885 (thereinafter called 'the said deed'), made between Wiremu Paraone of the one part and Perceval Barker (the present appellant) of the other part, and purporting to be pledged by that deed as security for the performance of the contract therein described as made between the said Wiremu Paraone and Perceval Barker

respecting the said Poututu Blocks A, B, and C; and that it was desirable that the said Court should be empowered to settle the whole of the litigation and claims arising out of the transactions recorded in the said deed, and to make all such orders and decrees and issue all such land titles as should be required for the settlement of all the said conflicting interests and for determining all debts, claims, and demands existing or claimed to exist between the parties asserting any of the aforesaid rights or claims."

Then it enacts:—

"Sect. 2. The Native Land Court shall have full jurisdiction to inquire into, adjust, and settle all accounts, claims, and matters in dispute between the parties, whether natives or Europeans, making claims to all or any of the several blocks of land mentioned and described in the said deed, and to make all such orders and decrees as shall be necessary for such purpose and for the purpose of giving such titles to the land described in the said deed as the said Court shall think fit, which orders and decrees shall be final and conclusive and binding upon all the said parties and upon the said lands, and the said Court is empowered to make orders declaring such of the parties as shall appear to be entitled thereto to be owners of such estate or interest in any of the said lands as to the said Court shall appear just.

"Sect. 3. Every order declaring any person to be the owner of any of the said lands shall be prepared and executed and dealt with in the same manner and have the same effect as an order made by the Court in partition in the exercise of its ordinary jurisdiction; and when such order has been made and issued it shall thereupon be lawful for the Governor by warrant under his hand to direct the land registrar of the district within which the land is situate to issue to the person in whose favour such order is made a certificate of title."

It is clear from the recital that Blocks A, B, and C are native land already within the jurisdiction of the Native Land Court, and actually being dealt with by that Court. It appears from the respondent Tucker's pleas in this suit that the other blocks have been the subject of prior adjudication in the

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ordinary jurisdiction of the Native Land Court; and from his case lodged in this appeal (paragraph 6) that he also claimed them by purchase in an execution sale, so that they cannot be native land according to the definition of 1888. It must be taken that the main reason for passing the Act was to bring under one authority an area of land subject to a group of claims all connected together, but some of which were not within the competence of the Land Court because they related to non-native land, or to collateral money transactions and matters of account. This is stated by Williams J. in the Court of Appeal. "Not only, therefore, is the Court authorized to determine the titles to particular land which the Court, apart from the Act, would have had no authority to determine, but the Court is empowered to determine questions of account which may arise not only between natives, but between Europeans and natives, and even between Europeans."

On April 23, 1892, Barton J., presiding in the Native Land Court, delivered judgments on matters in difference between the appellant and the three non-official respondents concerning the title to Poututu lands. On July 21, 1892, the appellant applied for a rehearing. On December 9, 1893, an order for rehearing was made by the then Chief Justice, Seth-Smith. In the meantime a new Court had been established by an Act which came into force on October 6, 1893, and is called, at least in this argument, the Validation Act.

The proceedings before the Land Court went on, and it appears from the judgments of the Court of Rehearing that a great multiplicity of matters were put in in order so that every question might be finally settled on a sitting to begin May 25, 1895. On that day the Court met, when it appeared that the three non-official respondents—Tucker, Wiremu Pere, and Peka Kerekere—had commenced litigation in the Validation Court respecting the lands: the two natives as plaintiffs, and Tucker as defendant. All three respondents contended that by force of the Validation Act, as amended in 1894, the commencement of proceedings in the Validation Court was to stay proceedings in all other Courts, even current proceedings in the Native Land Court under the Poututu Act. The learned judges of

that Court yielded to this contention, while pointing out the extreme inconvenience and hardship of such a result. They therefore stayed the proceedings, and the consequence was the present action for mandamus in the Supreme Court.

The action was heard before Conolly J. on November 18, 1895. That learned judge held that the Validation Act did not affect the proceedings in the Native Land Court; notwithstanding the general provision that the commencement of proceedings there shall operate as a stay of proceedings in any other Court in respect of the same matters. But on the construction of the Poututu Act itself he held that s. 2 means that the order of the Judge of First Instance is to be final and conclusive, and that the Act contemplates only a single hearing.

The three judges of the Court of Appeal were divided in opinion. Prendergast C.J. held that when new subjects are added to the jurisdiction of the Native Land Court they fall into its ordinary course of procedure, and that the reference in the Poututu Act to orders for partition was intended to give to Europeans the right to ask for a rehearing in matters of title which otherwise the Native Land Acts would only have given to natives. Williams J., with whom Dennistoun J. agreed, thought otherwise. If their Lordships rightly understand the reasoning of those learned judges, they think that, even independently of the words "final and conclusive" in s. 2, that section is so constructed as not to convey any right in the suitor to demand or any power in the Court to grant a rehearing. They say "the rehearing clauses in the Native Land Acts appear to be applicable only to matters in which the general jurisdiction of the Court attaches, and not to matters essentially different placed within the jurisdiction of the Court by special legislation, and in respect of which the orders and decrees of the Court are declared to be final and conclusive." And in another passage they say: "Furthermore, the only order as to rehearing that the Chief Judge can make is with respect to the whole or any part of the land, or the title thereto. The right of rehearing is therefore expressly confined to the case where the title to particular land has been

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the only question decided by the Court of First Instance." On such grounds they conclude that if any effect at all is to be given to the words "final and conclusive" it must be that they prevent the right of rehearing attaching in all cases within the scope of the Act. Then, in dealing with s. 3, they start with the conclusion that the right to rehearing is negatived by s. 2, and therefore orders affecting title are to be dealt with as partition orders "in respect of which the right of rehearing is taken away."

As regards the effect of the Validation Act, the learned Chief Justice and Williams J. both agree with Conolly J., while Dennistoun J. does not examine the point. Taking that point first, their Lordships are clear that the decisions below are right. The general maxim is, "Generalia specialibus non derogant." When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. This case is a peculiarly strong one for the application of the general maxim. The Legislature found an area of land comparatively small in extent to be the subject of intricate disputes in which both Europeans and natives took part. Some of those questions fell within the scope of the Native Land Court and others did not. It was for the benefit of all parties that a single tribunal should adjudicate on the whole group of questions. Therefore, as Williams J. has stated, a new authority was given to the Native Land Court as regards both land and matters of account. It would require a very clear expression of the mind of the Legislature before we should impute to it the intention of destroying the foundation of the work which it had initiated some four years before, and to which the Court has ever since been assiduously addressing itself.

Moreover, their Lordships asked during the argument whether it was clear that the Validation Court had jurisdiction over all the matters comprised in the Poututu Act. No very clear

answer was given at the bar. On examining the Act it appears much more probable that the jurisdiction given to the Validation Court is at the utmost only partial. By s. 2 the term "land" is defined as "land owned by or vested in natives under any title whatsoever, except land the ownership of which has not been determined by the Native Land Court." The jurisdiction is confined to controversies connected with land so defined. Now, so far as the lands dealt with under this Poututu Act are found to be vested in Europeans, to which effect these claims certainly are, they cannot fall within the definition; and so far as the specified blocks are found to be vested in natives, their ownership is still the subject of inquiry in the rehearing, and has not been determined by the Native Land Court, and they therefore are not within the definition. Their Lordships do not intend to decide these points, which have hardly been argued before them. But they are obviously points which require close attention. And it supplies a strong reason against any intention to stay proceedings under the Poututu Act summarily and abruptly by the mere commencement of proceedings under the Validation Act, if the capacity of the Validation Court to comprehend within its jurisdiction the whole of the Poututu disputes is on the face of it improbable, and could only be proved, if at all, after elaborate investigation. The Legislature could not have intended to displace the complete and precise jurisdiction adapted to the special case of Poututu, or to put it in the power of a defeated litigant to so displace it, without substituting something equally complete and precise in its place.

As regards the jurisdiction to rehear, their Lordships have to express disagreement with the Court of Appeal. They cannot see by what words the rehearing given by the Native Land Courts Acts is confined to cases where the title to particular land has been the only question decided by the Court of First Instance. If such a decision is embodied in the same decree with other matters not of an appealable nature, it still remains appealable. It may be that the other questions need not be opened at all. But what disputes may or must be opened in hearing an appealable decision must be decided according to

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the circumstances of each appeal. Their Lordships do not understand how the right of rehearing expressly given can be taken away because the same decree touches matter which taken by itself is not of an appealable nature.

The opinion given that the rehearing clauses apply only to the original range of jurisdiction and not to new subjects brought within it is the very point in dispute, and it must be determined entirely by the language which the Legislatures have used with reference to the subject-matter. Their Lordships do not enter into the question discussed below on the subject of probates. That turns on a different Act and is not before them. On the Poututu Act their only substantial ground for doubt is that they find themselves at variance with other judicial minds. The language itself raises no doubt in their minds. The decision which is to be final and conclusive is that of the Native Land Court. That means such decision as the Court finally comes to according to its own constitution and procedure. One class of its decisions, those relating to partition, is subject to rehearing at the instance of any suitor, while only natives may ask for rehearing of all classes of decisions. The Poututu Act says that orders such as are described in the concluding words of s. 2 and the opening ones of s. 3, namely, decisions on title to land, shall be dealt with in the same manner as an order made by the Court in partition in the exercise of its ordinary jurisdiction. That conveys to the mind the notion that with respect to decisions upon title Europeans as well as natives are allowed to ask for rehearings. The learned judges think that the prescribed application of partition practice to Poututu land orders is satisfied when other processes of a more ministerial and consequential character provided by other sections are applied. As to these other processes, the sections which provide them allow for the effect of rehearings; and the view of the learned judges must in consistency exclude not only s. 75, but important parts of other sections which they say are embodied in the Poututu Act. Their treatment of the case seems to their Lordships to involve a departure from very plain express language, and the substitution of unexpressed conjectural qualifications not to be implied from the new

character of the subject-matter brought within the Native Land Court, or from any other part of either Act.

Their Lordships are informed that since the institution of this suit the position of the Native Land Court has been altered, and that a mandamus in the terms of the plaintiff's prayer would be unsuitable. The Parliament of New Zealand however appears to have avoided interference with this litigation, and to have preserved the judicial machinery necessary for settling it. It will be better now to do no more than declare the rights of the parties, and to make an order as to the costs.

Their Lordships will humbly advise Her Majesty as follows: First, to declare that according to the true construction of the Poututu Jurisdiction Act, 1889, the plaintiff, Perceval Barker, was, on July 21, 1892, entitled to ask for a rehearing of the judgments of His Honour Judge Barton, Nos. 6 to 10, and that the Native Land Court had the power to grant such rehearing; secondly, to declare that the commencement of proceedings by the respondents, Wiremu Pere and Peka Kerekere, in the Validation Court did not operate to stay the proceedings in the Native Land Court in respect of such rehearing; thirdly, to order the two last-named respondents and the respondent William Henry Tucker to pay the plaintiff's costs in both Courts below. The last-named three respondents must also pay the costs of this appeal.

Solicitors for appellant: *Hollams, Sons, Coward & Hawksley.*
Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

J. C.* 1898 July 22; Aug. 3.

ENGLAND . . . . . DEFENDANT;

AND

WEBB . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Victorian Income Tax Act, 1895, *ss.* 5, 7, *sub-s.* 3—*Construction—Trusts.*

Held, that the appellant company, which carried on insurance business with strangers for gain to the company as a whole, but had not its principal office in Victoria, was by s. 5 of the Victorian Income Tax Act, 1895, liable to income tax on the proceeds from money lent on the security of land in Victoria.

It could not claim exemption under s. 7 (*c*), which exempts trusts and all associations not carrying on trade for purposes of gain to be divided amongst the members; for besides granting assurances to persons not its members, it trafficked in reversions, while "trusts" on its true construction means associations acting in or for Victoria.

APPEAL from a judgment of the Supreme Court (Sept. 20, 1897) affirming a judgment of the county court of Melbourne (Oct. 16, 1896).

The facts are stated in the judgment of their Lordships.

The question raised by the appeal was whether the Scottish Provident Institution carries on or is engaged in a trade within the meaning of the Income Tax Act, 1895, "for the purposes of gain to be divided among the shareholders or members thereof."

The Courts below by their judgments answered this question in the affirmative, and accordingly held that the institution was liable to income tax.

Cracknthorpe, Q.C., *Butcher*, Q.C., and *R. L. Blackburn*, for the appellant.

Haldane, Q.C., *Bray*, Q.C., and *Rowlatt*, for the respondent.

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, and SIR HENRY STRONG.

1898. Aug. 3. The judgment of their Lordships was delivered by

J. C. 1898 ENGLAND v. WEBB.

LORD HOBHOUSE. The formal appellant in this case is the officer and representative of the Scottish Provident Institution, which is the real appellant. It claims to be exempt from income tax, which the respondent, who is commissioner of taxes, seeks to impose upon it. The income in respect of which tax is claimed proceeds from money lent on the security of land in Victoria. The appellant company has no other property in the Colony, nor does it carry on business there. Its head office is in Edinburgh. The question turns entirely on the construction of the Income Tax Act, 1895, and its application to the business of the company.

The tax is imposed by s. 5 of the Act on all income derived by any person from the produce of property within Victoria. By the definition clause "person" includes every company except a company whose head or principal office or principal place of business is in Victoria. It is not disputed that the appellant company falls within the terms of s. 5.

Sect. 7 enacts that there shall be exempt from income tax all income derived or received by persons distributed under twelve heads. The appellant claims to fall under head (*e*), which is as follows: "All trusts, societies, associations, institutions, and public bodies not carrying on any trade, or not being engaged in any trade for the purposes of gain to be divided among the shareholders or members thereof." By the definition clause "trade" includes every profession, vocation, trade, business, calling, employment, and occupation. The Supreme Court has held that the company carries on business for the purpose of gain within head (*e*) so far as its operations outside Victoria are concerned, though it merely lends money on mortgage in Victoria; and that it is not exempted. The appeal is from that decision.

The company was started under a deed of constitution registered in the Books of Council and Session on June 8, 1837. Its objects, as there laid down, are correctly stated in the appellant's case thus :—

"(1.) To form a common fund on which provisions by way

J. C. 1898 ENGLAND v. WEBB.

of capital sums and annuities should be chargeable upon the failure of lives and upon survivorships by means of contributions corresponding to the value of such provisions to be paid by or on behalf of the persons becoming entitled thereto.

"(2.) That whatever surplus might eventually arise upon such contributions should be reserved for the benefit of and be equitably apportioned among the persons, or the representatives or nominees of the persons, from whose contributions such surplus shall have arisen."

Art. 27 of the deed provides that septennial accounts shall be taken, and that the surpluses which are then found to have arisen on the common fund shall be available to the members by additions to the sums payable on their policies. From this benefit, however, certain classes of policies are excluded. In terms of the deed no person can effect any form of assurance with the company without becoming ipso facto a member.

This is an ordinary type of mutual insurance company, on which footing it appears that the business was conducted for several years. In the year 1848 the company was incorporated by Act of Parliament, and its business was put upon a new footing. It became "entitled to carry on the business of effecting assurances on lives and survivorships, purchase and sale of annuities and of reversions, granting endowments, receiving money for investment and accumulation, and in general for carrying on all the business which now is or may come to be connected with a life assurance society in all the various branches thereof."

From that time to this the business of the company has been that which is indicated in the Act of 1848. It is the ordinary business of a life assurance society, and in addition that of a society for the purchase and sale of annuities and reversions.

When evidence was taken for the trial of the case in the first court, the county court of Melbourne, there was a great deal of controversy with reference to gains made from the forfeited policies of members, from grants of annuities to members, and from the classes of policies granted to members on the principle of non-participation in the growing surpluses. All those are parts of the original constitution. Their Lordships pass them

by, not finding it necessary to examine whether or no they constitute a trade or business carried on for gain to the company, which is to be divided among its members. Of course it happens, and indeed it is the very principle of a mutual insurance company, that some members receive more than they pay while others pay more than they receive. It is sufficient here to say that in 1848 the company became one of those which carry on business with strangers for gain to the company as a whole. It has granted assurances to persons who are not its members; and though it is said that this kind of business has only been done with other insurance companies and by way of guarantee, it is done, and on terms calculated for profit. It has also trafficked to some extent in reversions. That is carrying on business for gain, and the gain is to be divided among the members of the company. It is urged that the additional business of a general kind is very small; and compared with the magnitude of the other transactions it is so; but it is not unsubstantial, and it is enough to prevent the company from bringing itself within the terms of head (*e*).

It should also be noticed that the next head of exemption (*f*) is expressed as follows: "Any mutual life assurance company whose head or principal office or principal place of business is in Australia." Certainly the inference to be drawn from that exemption is that a mutual insurance company which, like the present appellant, has not any place of business in Australia is not to be exempt. It is right to be cautious in laying stress on an inference of this sort. But it is at least not improbable that the framers of the Income Tax Act may have looked upon all companies whose business it is to make money bargains for the benefit of their members as being companies which carry on business for gain to their members; and the way in which they have dealt with mutual insurance companies under head (*f*) lends countenance to the supposition that they did so think.

Another point of much more importance was raised in the course of the argument and discussed at the bar, though it does not seem to have been raised in the Court below; and that is, whether the trusts, &c., mentioned in head (*e*) can mean trusts, &c., not operating in Victoria. It seems very

J. C. 1898 ENGLAND v. WEBB.

strange that the Victorian Parliament should desire to forego income tax in favour of a Scottish institution which has no connection with Victoria except in its character of a property-owner there. If a party of friends in England employ a common agent in Victoria to put out the money of each on mortgage, each would be taxed. If, then, they associate themselves for the purpose of doing so, is it intended that they shall escape the tax? And yet they would be an association simply for investment, and not trading for gain.

Moreover, there are other heads of exemption framed without regard to locality. Head (*c*) exempts "All bodies formed solely for the purposes of religion." Head (*d*) "All registered friendly societies, provident societies, building societies and trade unions." Head (*h*) "Any mining company." It can hardly be that the Parliament of Victoria has such great regard for social and industrial combinations and efforts all over the world that it should offer to the Jesuits' Society in Rome, to the Amalgamated Engineers and the Athenæum Club (1) in England, and to the Witwaterstrand Company in Africa, exemption from income tax if they choose to invest their funds in Victorian land, or in mortgages upon it, or, it would seem, in the purchase of Government stock. It would require a much clearer expression than can be found in the general words of these heads of exemption to induce their Lordships to infer any such intentions on the part of the Victorian Legislature. It seems to them much more reasonable to suppose that in framing heads (*c*), (*d*), and (*h*) the Legislature was speaking of bodies acting in or for Victoria, and the same reason applies to head (*e*).

Their Lordships, therefore, come to the same conclusion with the Court below. They will humbly advise Her Majesty to dismiss the appeal, and the appellant must pay the costs.

Solicitor for appellant: *F. H. Goldney.*
Solicitors for respondent: *Freshfields & Williams.*

(1) [This would be, of course, not under any of the heads quoted immediately above, but under head (*e*)—"associations . . . . not carrying on any trade"—p. 759, above.]

[PRIVY COUNCIL.]

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA, LIMITED . . . . . } DEFENDANTS;

AND

SWAN AND OTHERS . . . . . PLAINTIFFS.

J. C.* 1898 *July* 26, 27; *Aug.* 3.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Companies Act, 1890, s. 384—*Trustees' Powers of Investment —Deposits with Banks.*

Sect. 384 of the Victoria Companies Act, 1890, while authorizing the employment of bankers, does not on its true construction enlarge the powers of investment possessed by trustee companies in common with other trustees.

Held, that the appellant company was not authorized thereunder, or under its special Act, to invest trust moneys on deposit at interest with banks.

APPEAL from two orders of the Supreme Court (July 20 and Aug. 31, 1897).

The main question raised by the appeal was one of the proper construction of the proviso to s. 384 of the Companies Act, 1890, set out in their Lordships' judgment, wherein also the facts of the case are stated.

Cozens-Hardy, Q.C., *Haldane, Q.C.*, and *Sargant*, for the appellants, contended that the true intention and operation of the proviso to s. 384 were, as the words import, to authorize a particular kind of investment which would otherwise have been unauthorized. The effect of that proviso when properly construed was to enlarge the powers and remove the liabilities of trustee companies themselves, and not merely those of their directors, members, and officers. As regards the particular class of investment, namely, deposits with certain banks, it could not have been intended to remove the criminal liability

* *Present:* LORD MACNAGHTEN, LORD MORRIS, LORD JAMES OF HEREFORD, and SIR HENRY STRONG.

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of the officers and leave the civil liability of the companies. The broad view of the section was the correct one—that it removed all liability for such investments, and practically authorized them.

Swinfen Eady, Q.C., and *Danckwerts*, for the respondents, contended that the deposits in question were made by the appellants in breach of the trust upon which they held the moneys deposited as administrators of the intestate. Such deposits were not authorized by s. 384, and the appellants were bound to make good the amounts deposited to the estate, and to distribute the estate so indemnified amongst those entitled thereto.

Cozens-Hardy, Q.C., replied.

1898 *Aug.* 3.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. In their Lordships' opinion this is a very plain case, and a very bold appeal.

The appellants are a "trustee company"—that is to say, a company incorporated by statute and authorized by its special Act to undertake the duties of executors, administrators, and trustees for pecuniary reward. The powers and obligations of trustee companies depend in each case on the special Act, and on certain provisions of the Trustee Act, 1890.

The sole question for adjudication on this appeal is whether, according to the law in force in the Colony of Victoria, the placing of trust moneys on deposit at interest with banks fulfilling certain conditions is or is not an authorized investment in the case of trustee companies. At the time when the events occurred which gave rise to this litigation, investments on real or Government securities were the only authorized investments for trust moneys in the hands of ordinary trustees.

In December, 1890, the appellants were employed to administer the estate of one George Swan, who had died intestate in the previous October, leaving a widow and six children, some of whom were infants.

The personal estate to be got in was under 5000*l*. It consisted of a policy of insurance, two sums due on promissory notes, which matured on December 3, 1890, and March 3, 1891,

and moneys partly on deposit and partly on account current with the intestate's bankers, the English, Scottish, and Australian Chartered Bank. The debts due by the deceased were nine in all, and came to a trifle over 100*l*. Within four months from the grant of administration the appellants had completed their labours, all but the distribution of the net assets among the persons entitled, and on April 14, 1891, they credited themselves with a commission of over 200*l*. by way of remuneration for their services.

Instead of paying the widow and the adult next of kin, and paying into court or setting apart and investing the shares of the infants, as it was their duty to do, the appellants kept in their own hands, undivided and uninvested, the clear balance of the estate. The widow, who does not seem to have been fully aware of her rights, begged the appellants to invest, at their earliest convenience and to the best advantage, the moneys they had in hand, and to get them "securely placed." She wrote to that effect on June 16, July 6, July 13, and August 3, 1891. She and her children, she said, had no other source of income. The letter of August 3 produced a reply. The manager wrote that he was desired to state that the directors were "exceedingly anxious" to get the money in her husband's estate "invested in suitable securities as early as possible," but he added, "securities of the character acceptable to the directors are very difficult to obtain at present." From that letter it may perhaps be inferred either that the directors of the appellant company, two of whom were also on the board of the Melbourne Bank, considered investments on deposit receipts unsuitable, or else that they had not then discovered the extent of the powers of trustee companies for which they are now contending.

In his evidence at the trial the manager says, "On September 8, 1881, Mrs. Swan told me that, as we could not find securities on mortgage, she wished the money placed on deposit in the English, Scottish, and Australian Chartered Bank." On the following day the manager wrote to Mrs. Swan to say that the board approved of carrying out her wish that the money "should be placed on deposit in a bank in lieu of investing it

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on mortgage," but that they thought it preferable to divide the interest between two banks, and they therefore proposed to place 2100*l.* in the English, Scottish, and Australian Chartered Bank, and 2000*l.* in the City of Melbourne Bank, at 5 per cent. for twelve months.

In accordance with the intimation contained in that letter, the appellants placed a part of the moneys belonging to the intestate's estate on deposit with each of the two banks. The deposits were renewed for further periods at different rates of interest. Ultimately both banks failed. The Chartered Bank was reconstructed. The Melbourne Bank was in course of liquidation at the time of the trial.

In the present action, in which the children of the intestate alone were plaintiffs, the appellants were called upon to make good the loss occasioned by the failure of the two banks. At their instance the widow was added as defendant, but she did not enter an appearance, nor was she apparently served with any notice raising an issue between her co-defendants and herself. Besides urging that if they had done anything amiss they ought to be indemnified by the widow who had so led them astray, the appellants contended that their action was justified by s. 384 of the Companies Act, 1890. They insisted that under the provisions of that section the deposits complained of were authorized investments. Holroyd J., before whom the action came on for trial, reserved that point for the full Court. It was determined adversely to the appellants' contention; and thereupon the learned judge declared that the deposits in question were breaches of trust on the part of the appellants which they were liable to make good. He rejected their claim to indemnity, but he held that the widow could not complain of the deposit with the Chartered Bank which she had herself recommended. He determined, accordingly, that she must look to the reconstructed bank for her share of the moneys deposited with the Chartered Bank before its failure.

The appellants have appealed from the judgment of the full Court and the judgment of Holroyd J.

The argument on their behalf was rested on the provisions of the Trustee Act, 1890, relating to trustee companies.

Sect. 383 of that Act imposes on trustee companies the same duties and obligations as those to which any individual acting in a similar capacity would be subject.

Sect. 384, after requiring a trustee company to keep separate accounts of the estates under its control, enacts that any director, member, or officer of a trustee company who knowingly and wilfully appropriates or deals with any property of which such company has control, or knowingly and wilfully lends or otherwise deals with any moneys received by such company otherwise than in accordance with that part of the Act of 1890, the instrument creating the trust and the law for the time being in force, shall be guilty of a misdemeanour. Then follows this proviso, that, "notwithstanding anything in this section contained," any trustee company may deposit any moneys of which it has control with any banking company or corporation fulfilling certain conditions (which, admittedly, were fulfilled in the case of the Chartered Bank and the Melbourne Bank), but no deposit was to be made of more than 20,000*l.* on behalf of any one estate.

The terms of the proviso seem to shew that it was apprehended that the thing which the proviso authorizes might, if done without authority, have brought directors or officers of trustee companies under the operation of the earlier part of the section, and exposed them to a criminal charge. What is it, then, that the proviso authorizes? There is not a word about investment in the section from beginning to end. There is nothing pointing in that direction. There is nothing said about interest. The section, in their Lordships' opinion, does not enlarge the powers of investment possessed by trustee companies in common with other trustees. It does not authorize them to deposit trust moneys with a bank in any case in which an individual acting in a similar capacity would not be justified in employing a banker. It is a restrictive as well as an enabling clause. While it relieves directors and officers of a trustee company from the apprehension of criminal liability if the deposit is properly made, it requires that deposits shall only be made with banks of a certain class, and that no deposit in the case of any one estate shall exceed a certain limit. The

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framers of the Act knew perfectly well the difference between depositing moneys with a bank and investing moneys on security. The very next section draws the distinction. Sect. 385 authorizes trustee companies to deposit their own funds with a bank of deposit, or to invest them on certain specified securities.

The learned counsel for the appellants were asked why trustee companies should have conferred upon them larger powers of investment than ordinary trustees. The answer was that it was the policy of the Legislature to favour trustee companies. No doubt, if these companies had wider powers of investment than other trustees the privilege might serve to attract custom. But it would be a singular way of shewing them special favour to allow them to do with impunity that which would be a breach of trust if done by ordinary trustees. If such had been the intention of the Legislature, one would certainly have expected to find the intention declared in plain and unambiguous language.

Sect. 384 of the Act of 1890 is not happily expressed. But in their Lordships' opinion it does not afford any grounds for the contention of the appellants.

Under ordinary circumstances it would not be necessary or proper to say anything more. But, inasmuch as a judgment unsuccessfully challenged on appeal may possibly be taken as a precedent in other cases, their Lordships think it right to add that in their opinion the judgment under review fell short of what the justice of the case required. Their Lordships are unable to see what jurisdiction the learned judge had, under the circumstances, to make a decree between the co-defendants. Assuming such a jurisdiction to exist, their Lordships are unable to discover any ground for depriving the widow of her full rights.

Their Lordships will humbly advise Her Majesty that the appeal must be dismissed. The appellants will pay the costs of the appeal.

Solicitors for appellants: *St. Barbe Sladen & Wing.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

HARDING AND ANOTHER . . . . . APPELLANTS; J. C.*

AND 1898

THE COMMISSIONERS OF STAMPS FOR QUEENSLAND . . . . . } RESPONDENTS. *May* 11; *June* 24.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Law of Queensland—Succession and Probate Duties Act, 1892, *s.* 4—*Succession defined—Movables locally situated in the Colony—Domicil of the Testator.*

Held, that s. 4 of Queensland Succession and Probate Duties Act, 1892, defining a "succession" (being the same as s. 2 of the English Succession Duty Act of 1853) must be read in the sense affixed to the English Act by the English tribunals; and that it does not include movables locally situated in Queensland which belonged to a testator whose domicil was in Victoria:

Held, further, that the Amendment Act of 1895, s. 2, is not retrospective in its operation.

APPEAL from a judgment of the Supreme Court (Dec. 18, 1896).

The question was whether succession duty was payable on that portion of the property of the testator, Silas Harding, which consisted (*a*) of certain mortgage debts of very large amount which were secured as to part thereof on certain freehold and leasehold hereditaments in the Colony of Queensland and the stock thereon, and as to the remainder upon certain freehold property in the same Colony and the stock thereon; and (*b*) of certain shares in the Royal Bank of Queensland, Limited.

The appellants, as executors and trustees of the will of the said testator, contended that no such duty was payable. The respondents contended that succession duty was payable on the whole of the mortgage debts and on the shares.

The facts of the case and the sections applicable thereto are set out in the judgment of their Lordships.

* *Present*:—LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR RICHARD COUCH.

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The judgment appealed from was to the effect that s. 2 of the Act of 1895 was declaratory and retrospective in the sense that it governed any case which came before the Court for determination after it was passed, and, consequently, that the property liable to succession duty included all Queensland property collected irrespective of the law under which it was distributed. The Court was, therefore, of opinion that succession duty was chargeable on all the testator's property which was in Queensland at the time of his death, and that since, so far as the mortgages affected the realty, they took effect only upon registration under the Real Property Acts, and an original of the land mortgages was in fact permanently retained in the registry, and since the whole of the debts were covered by the covenants in the real property mortgages, those debts must, therefore, be considered for the purpose of succession duty as being property in Queensland. The Court was, however, of opinion that the value of the succession in respect of the debts was not the nominal amount, but the actual value of the succession. The Court also expressed the opinion that even if the said Act of 1895 were not retrospective, the mortgage debts would still be liable to succession duty, since, upon the true construction of the Succession and Probate Duties Act, 1892, the value of the testator's interests in the said mortgages would be chargeable with duty as being real estate in Queensland.

Sir R. Reid, Q.C., *Warrington, Q.C.*, and *S. Dickinson*, for the appellants, contended that the Supreme Court were wrong in declaring that succession duty was chargeable on all the property of the testator, and that the two mortgage debts should be deemed to be property in Queensland. The testator died on June 13, 1894, and the succession to his property accrued on that date. That was prior to the Act of 1895, and on the true construction of that Act it had no retrospective effect so as to impose a tax on successions which had already accrued: *Lauri* v. *Renad.* (1) On the true construction of the Act of 1892, considered apart from that of 1895, personal property other than leaseholds situate in Queensland, of

(1) [1892] 3 Ch. 402.

persons dying domiciled elsewhere than in Queensland, was not subject to succession duty. The two mortgages and shares in question were for all purposes part of the testator's personal estate. If the Act of 1895 applied, they were not property within Queensland within the meaning of s. 2. Even if the appellants' interests in the freeholds and leaseholds comprised in the mortgages could be rightly treated as real estate within the meaning of the Act of 1892, still their interest in the other property could not be so chargeable. Although the mortgages were at the date of the testator's death within the Colony of Queensland, they were so only for a temporary purpose, and not because any person within the Colony had any title to or interest in them. The appellants were not liable to pay any succession duty whatever on the mortgages or shares. If that were decided against them, the duty should be assessed only on the value of those securities at the testator's death, after giving credit for all debts due by the estate, and as regards the value of the shares, after allowing for the whole of the calls already made in respect thereof.

Haldane, *Q.C.*, *Bray*, *Q.C.*, and *Grantham*, for the respondents, contended that the mortgages of the freeholds and leaseholds (which stood on a different footing from the bank shares) situated within the Colony of Queensland were within the meaning of the Act of 1892 property within Queensland. So also were the mortgages of the live stock and chattels on the leasehold lands and the bank shares. For definitions of land, mortgages, and real property as recognised in Colonial Acts, see Queensland Real Property Act, 1861, s. 3; Queensland Acts Shortening Act, 1867, s. 11; the Succession Act of 1892, ss. 3, 4. With regard to the mortgages being immovable property, see *Wallace* v. *Attorney-General* (1); *Lauri* v. *Renad.* (2) They are incorporeal rights: see *Chatfield* v. *Berchtoldt* (3); *Freke* v. *Lord Carbery* (4); *Walsh* v. *Reg.* (5); Dicey's Conflict of Laws, p. 784; *Henty* v. *Reg.* (6) They were locally situate in the Colony, and this question must be decided by locality.

(1) (1865) L. R. 1 Ch. 1.
(2) [1892] 3 Ch. 402.
(3) (1872) L. R. 7 Ch. 192.
(4) (1872) L. R. 16 Eq. 462.
(5) [1894] A. C. 144.
(6) [1896] A. C. 567.

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The Queensland Legislature adopted that principle in the Act of 1895 which has retrospective effect, or at all events controls the construction to be put on the Act of 1892, of the meaning of which it is declaratory: see *Attorney-General* v. *Theobald* (1); *Attorney-General* v. *Marquis of Hertford* (2); *Rex* v. *Inhabitants of Dursley*. (3)

Warrington, Q.C., replied.

1898 *June* 24.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. This appeal arises out of a claim made on behalf of the Crown to charge succession duty on the estate of Silas Harding. The appellants are his executors. The respondents are the Stamp Commissioners, who claim duty. The Supreme Court to whom the executors appealed have decided that duty is chargeable. On some disputed points they decided against the commissioners, but there is no appeal on those points. The executors maintain that no duty is payable at all.

Silas Harding died in the year 1894, domiciled in the Colony of Victoria. In September, 1894, his will was proved in Victoria, and in April, 1895, ancillary letters of probate were granted by the Supreme Court of Queensland. He had a large property, and among it were the following particulars: (1.) A debt of 102,036*l.* 2*s.* 7*d.* due from a Mr. Doneley; (2.) a debt of 20,863*l.* 0*s.* 3*d.* due from the Queensland Brewery; (3.) 3000 shares in the Royal Bank of Queensland. The two debts were secured by mortgages on land, stock, and goods in Queensland. It is on these three items that the Supreme Court has held duty to be chargeable under the terms of the Succession and Probate Duties Act, 1892, as amended in 1895.

From the written reasons of the learned judges their Lordships collect that if the Act of 1892 had stood alone they would have felt constrained by the course of decisions in England, though not fully assenting to them, to hold that no duty was chargeable. Their judgment in effect turns on the application

(1) (1890) 24 Q. B. D. 557. (2) (1849) 3 Ex. 662.
(3) (1832) 3 B. & Ad. 465.

of the Act of 1895, and the first question is what was the law immediately before that Act was passed.

Sect. 4 of the Act of 1892 is in effect, as the learned judges point out, a transcript of s. 2 of the English Succession Duty Act of 1853. The material words are "Every . . . . disposition of property by reason of which any person . . . . shall become beneficially entitled to any property upon the death of any person . . . . shall be deemed . . . . to confer on the person entitled by reason of such disposition . . . . a succession"; and on that succession the duties are fastened. The literal force of these expressions includes the estate of Silas Harding. But then it includes a great deal more which nobody can suppose that the Legislature intended to tax: it includes all persons and all property all over the world, and if not confined within reasonable limits would enable the Queensland authorities to levy a tax in respect of foreign property on foreigners when within their power. Abnormal consequences such as these have been avoided by judicial decisions in England.

In *Thompson* v. *Advocate-General* (1) the question arose under words of a similar character in the Act of 55 Geo. 3, c. 184. That Act imposed duties on "every legacy given by any will of any person." A gentleman domiciled in Demerara owned money locally situate in Scotland on which the Crown claimed legacy duty. The case was ultimately decided in the House of Lords; the judges were consulted, and their joint opinion delivered by Tindal C.J. He pointed out the absolute necessity of limiting the sense of the words, and laid it down that such necessary limitation is that the statute does not extend to the will of any person domiciled out of Great Britain, whether the assets are locally situate there or not. That opinion was adopted by the House.

In *Wallace* v. *Attorney-General* (2) a similar question arose under s. 2 of the English Succession Duty Act of 1853, which defines a succession in the same way as the Queensland Act of 1892. A gentleman domiciled in France owned personal property in England consisting of a sum of Consols. The Crown

(1) (1845) 12 Cl. & F. 1. (2) L. R. 1 Ch. 1.

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claimed succession duty on that property. Lord Cranworth held that the same limitation which had been put on the words "every legacy given by any will of any person" must be put on the words "every disposition whereby any person becomes entitled," and that the person intended is a person who becomes entitled by the laws of this country.

The soundness of this principle of construction has never been impugned, nor has the British Legislature thought fit to put any different limitation upon the generality of the terms in which legacy duty and succession duty are imposed. The matter appears to be well summed up in Mr. Dicey's work on the Conflict of Laws at p. 785, in which he paraphrases Lord Cranworth's application of the principle "Mobilia sequuntur personam" by saying that the law of domicil prevails over that of situation.

It is, of course, a maintainable opinion that the law of situation should prevail, and that a line which brings under the general words of taxation property which is protected by the taxing State, and which in case of dispute is administered by it, would form a more reasonable limitation of such words than the limitation by domicil. The learned judges below inclined to that principle; and the Queensland Legislature has adopted it. But the Court has only to decide what the Legislature meant when it passed the Act of 1892. Now, the decision in *Thompson's Case* (1) was given in the year 1845; that in *Wallace's Case* (2) just twenty years later; and it has been taken ever since that the expressions in question do not apply to movable property belonging to persons of foreign domicil. Nearly thirty years after the later decision the Queensland Legislature passed their Succession Duty Act in terms identical with those of the English Act of 1853. It is impossible to suppose that they did not intend those terms to be read in the sense affixed to them by the English tribunals, and in which they would be read by every lawyer and every official conversant with the subject-matter.

Arguments have been presented at the bar which are founded on definitions of real estate in Queensland statutes, and on

(1) 12 Cl. & F. 1. (2) L. R. 1 Ch. 1.

decisions respecting the locality of mortgage debts and similar property. Their Lordships fail to see that the definitions were intended to apply or do apply to the principle that movables follow the person. And, as regards locality, it is clear that the assets now in question have locality in Queensland; but that does not affect the beneficial interest to which succession duty is attached, and which devolves according to the law of the owner's domicil.

It remains to see whether the Act of 1895 alters the incidence of the Act of 1892 upon a will which took effect in 1894, and the probate of which was granted in Queensland several months before the later Act came into force; in other words, whether the Act of 1895 is retrospective.

The Act is entitled "An Act to amend the Succession and Probate Duties Act, 1892"; and s. 1 provides that it may be cited as "The Succession and Probate Duties Act, 1892, Amendment Act of 1895." The important section is the second, which runs thus:—

"2. It is hereby declared that upon the issue of any grant of probate or administration in Queensland, succession duty is chargeable in respect of all property within Queensland, although the testator or intestate may not have had his domicil in Queensland."

That enactment is calculated to meet such cases as the present one, and if retrospective would be conclusive in favour of the respondents. The Supreme Court think that the section is declaratory because of the opening expression, "it is declared"; and then they go on to reason that a declaratory Act is primâ facie retrospective, and confine themselves to examining whether it contains anything of a contrary nature so as to neutralize its declaratory and retrospective character.

Their Lordships cannot take such a view of the Act. The use of the expression "it is declared" to introduce new rules of law is not incorrect, and is far from uncommon. The nature of the Act must be determined from its provisions. Now, the Act does not contain any words to shew that it purports to construe the Act of 1892; it does purport to amend it; every other of its provisions is in language prospective, and

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in s. 2 itself the new rule is to take effect "upon the issue of any grant of probate," which is not fitting language to apply to estates for which probate has already been granted. In fact, the language of the Act points, as their Lordships think, distinctly to future operations. And, inasmuch as it falls under two well-established canons of construction, both requiring that, as against the persons sought to be affected, it should be shewn quite clearly and strictly to affect them—first, that which relates to statutes imposing liabilities, and, secondly, that which relates to retrospective statutes—their Lordships feel no hesitation in deciding that the Act cannot be retrospective.

The result is that, when the will of Silas Harding took effect and when the Queensland letters of probate were granted, the law of 1892 did not subject his movable assets to succession duty, and that the state of things so existing has not been disturbed by subsequent legislation. They will humbly advise Her Majesty to discharge the order appealed from so far as it declares that succession duty is chargeable on all the property of the testator which was in Queensland at the time of his death, and, instead thereof, to declare that no succession duty is payable on the three items of the testator's property which are the subject of this appeal. The respondents must pay the costs of this appeal.

Solicitors for appellants: *Murray, Hutchins, Stirling & Murray.*

Solicitors for respondents: *Freshfields & Williams.*

[PRIVY COUNCIL.]

BROOMER . . . . . DEFENDANT; J. C.*

AND 1898

ARTHUR . . . . . PLAINTIFF. *July* 19, 20; *Aug.* 3.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Deed of Settlement by Wife's Father—Rights of Husband and Wife in Settled Estate—Claim of Husband's Heir.

By the law of Jersey a conveyance of real estate by a husband to his wife, stante matrimonio, to the prejudice of his lawful heirs is invalid.

Where, by deed of family arrangement, it appeared that a husband and his wife, separated quant aux biens, each took from her father (subject to a charge of an annuity in his favour) a conjoint interest in the settled lands during their joint lives, with the chance of the fee on survivorship:—

Held, that the deed was in no sense a conveyance by the husband of any interest acquired by him thereunder; and that on his death before his wife his interest ceased and could not pass to his heirs.

APPEAL from a judgment of the Superior Number of the Royal Court (May 20, 1897) affirming a judgment of the Inferior Number (December 3, 1896).

The facts are stated in the judgment of their Lordships.

The judgments appealed from were to this effect:—

"Having regard to the custom which forbids married persons to confer benefits upon each other, or to make conveyances by which the property of the one may come to the other directly or indirectly, the Court, according to the plaintiff's claim, has determined that there is ground for annulling the following provision in the said conveyance of the 22nd November, 1884, 'conjointement par ensemble à qui plus vivrait plus tiendrait et au plus suffisant des deux pour le tout et pour ses hoirs.' And the Court has further determined that the effect of the said annulment is to give to the heirs of the said James Arthur half of the real property taken and acquired by the said conveyance, and to leave the other half in the possession of the

* *Present:* LORD WATSON, LORD HOBHOUSE, LORD DAVEY, and SIR HENRY STRONG.

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said Jane Catherine Broomer, who at the time of the making of the said conveyance was 'femme séparée quant aux biens' of the said James Arthur, and consequently a party capable under the circumstances of acquiring property in her own name."

C. E. Jenkins, Q.C., and *J. G. Wood*, for the appellant, contended that by Jersey law the effect of a "séparation quant aux biens" was practically to make the wife a feme sole, and to prevent the application of the rule that a wife during coverture cannot acquire property except for the benefit of her husband. But, by the true construction of the deed of November, 1884, the appellant did not acquire any interest in the lands comprised therein directly or indirectly from her husband. She derived title from her father, and, on the death of her husband, she became entitled to the whole absolutely. Whatever interest the husband had taken ceased with his death, and there was nothing which he could transmit to the respondent.

Haldane, Q.C., and *Dennis*, for the respondent, contended that the appellant's interest under the deed had been acquired by her by way of purchase during coverture, and, therefore, accrued to the benefit of the husband absolutely. It purported to convey land for value to husband and wife and the survivor. In that respect it was voidable at the suit of the respondent, so far as it gave the wife an interest by survivorship, as being a disposition by the husband in favour of his wife. The ground for this contention is that the husband was a party to the purchase consideration. He had entered into covenants binding the whole of his property, personal and real, for payment of the rents charged on the property conveyed, and of life annuities to the grantor, and he had induced his father to enter into collateral covenants for the same purpose. It was not a voluntary deed of gift or settlement by the appellant's father, but a deed of purchase under which the husband acquired interests which he thereby conveyed to his wife. [Reference was made to the report of the Commissioners to inquire into the laws of Jersey (1861), p. xix., as to a husband's limited power of disposition in favour of his wife; art. 410 of the Coutume

Réformée of Normandy; Berault (ed. (1614), p. 551, and Godefroy, vol. ii. p. 110, and Basnage, vol. ii. p. 174, on art. 410; Terrien, pp. 237, 242, liv. vii. c. 7.

Jenkins, Q.C., replied.

1898 Aug. 3.

The judgment of their Lordships was delivered by

LORD WATSON. The late James Arthur, son of Nicolas Arthur, married the appellant Jane Catherine Broomer, who was the only child of William Broomer. The said William Broomer died on July 9, 1885; and the appellant's husband died on July 27, 1896, intestate, the heir entitled to succeed to his real estate being his nephew Walter Arthur, the respondent in this appeal.

After their marriage, and before the date of the contract or deed after mentioned, the appellant became, in accordance with the laws of Jersey, separated from her husband quant aux biens. The legal effect of the separation was to place all real property which the appellant was possessed of at the time, and all real and personal property which she might afterwards acquire during the subsistence of the marriage, under her own control and at her own disposal, free from the debts and engagements of her husband, and that the appellant became entitled to sue and liable to be sued in respect of such property as a feme sole.

On November 22, 1884, four parties, these being the late James Arthur, his father Nicolas Arthur, the appellant, and her father William Broomer, appeared in court, and formally executed a deed of conveyance and contract, the terms of which have given rise to this litigation.

By that deed the only person who made a conveyance of property was William Broomer. He thereby conveyed seven different parcels of land in Jersey, subject to certain ancient charges, to James Arthur and the appellant, his separated wife, "conjointement par ensemble à qui plus vivra plus tiendra et le plus suffisant des deux pour le tout et pour ses hoirs." The conveyance was made upon the express consideration and condition that a pension or annuity of a specified amount was to be received by Mr. Broomer during his lifetime, and that each parcel conveyed was to be hypothecated for a

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proportion of such pension or annuity. The appellant and her husband personally bound themselves, the survivor of them, and their heirs for payment of the annuity. Nicolas Arthur became a party to the deed, to the extent only of binding himself and his heirs as guarantors of the personal obligation undertaken by the spouses.

Upon the dissolution of their marriage by the death of James Arthur in July, 1896, the appellant, as survivor, entered into possession of the whole parcels of land conveyed as aforesaid. The present suit was brought against her, before the Royal Court of Jersey, by the respondent, as heir-at-law of the deceased James Arthur, for annulment of the dispositive words quoted in the preceding paragraph, and for recovery of the entirety of the lands thereby conveyed, upon the ground that by the law of Jersey a wife could not, during the subsistence of the marriage, take any title to real estate except for behoof of her husband and his heirs.

The Court of First Instance held that the rule of law upon which the respondent's demand was based did not apply, because at the date of the deed of November, 1884, the appellant was separated quant aux biens from her husband. But they gave the respondent decree for one moiety of the lands which he claimed, in deference to a well-established rule of the law of Jersey which invalidates any gift or conveyance of his real estate made by a husband, stante matrimonio, in favour of his wife, to the prejudice of his lawful heir. That decision was affirmed on appeal by the Full Court upon the same ground.

The decisions of both Courts below necessarily proceed upon the assumption that James Arthur had an interest to the extent of one half in the fee of the lands conveyed by his father-in-law, which would have passed upon his death to his heir-at-law had it not been settled by him upon the appellant as surviving spouse. If that were held to be the real substance and effect of the arrangement embodied in the deed of November 22, 1884, counsel for the appellant did not dispute that such a disposition of his heritage by the deceased James Arthur to his wife could not avail the appellant in competition with the respondent.

In dealing with this point, it is necessary to keep in view that James Arthur and his wife at no time acquired any interest in the lands which are the subject-matter of this action, or disposed of any interest which they may have had in these lands, except under the deed of November 22, 1884. Having regard to the arguments which were addressed to their Lordships for the respondent, it may not be superfluous to add that neither of the spouses can be held to have disposed by that deed of any interest which the deed did not give them.

Counsel for the respondent maintained that the transaction embodied in the deed of November, 1884, was in substance an onerous purchase by the two spouses of the fee of the lands conveyed by William Broomer, coupled with a disposition by each of them of his or her interest in the purchase to the other in the event of his or her survivance. Their Lordships do not think that the provisions of the deed can, upon any fair canon of construction, be resolved into these elements. It is true that the spouses gave consideration for the deed in this sense—that they came under a personal obligation to pay Mr. Broomer's annuity. But the annuity was also made a charge upon the property conveyed, and to that extent it was in the nature of a reservation from the conveyance.

Their Lordships are of opinion that in its true character the deed is not a contract of sale and purchase, but a family arrangement. The consideration emanating from the spouses was not for a conveyance of the lands in fee, to be disposed of or settled at their pleasure. It was given for a conveyance and settlement of the lands in terms which William Broomer was willing to execute. According to the conveyance which he did execute, which is the measure of their right, each of the spouses took nothing more than a conjoint interest in the settled lands during their joint lives, with the chance of getting the fee of the whole in the event of his or her survivance. James Arthur was the pre-deceasing spouse, and his interest expired with him. He never had any interest in the fee which could pass to his heirs.

For these reasons their Lordships will humbly advise Her Majesty to reverse the judgments appealed from, and to order

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that the respondent shall pay to the appellant the costs incurred by her in both Courts below. The respondent must pay to the appellant her costs of this appeal.

Solicitors for appellant: *Bennett & Co.*
Solicitors for respondent: *R. S. Taylor, Son & Humbert.*

[PRIVY COUNCIL.]

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SMYTH . . . . . PLAINTIFF;

AND

THE QUEEN . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victoria Public Service Act, 1890, *ss.* 3, 107—"*Prosecutor for the Queen*"—"*Prosecuting Barrister*"—*Construction—Right to Pension.*

Held, that the appellant was entitled under s. 107 of the Public Service Act, 1890, to superannuation allowance by virtue of having held the office of "Prosecutor for the Queen," notwithstanding that he held during pleasure.

Held, further, that he was not excluded therefrom as a "prosecuting barrister" within the meaning of the excluding clause (s. 3).

It appearing that the two classes of functionaries were totally distinct, there is no rule of construction to the effect that when one only is named the other is meant or included.

APPEAL from a judgment of the Full Bench of the Supreme Court (Oct. 25, 1897) and consequent order (Nov. 8, 1897) directing that judgment be entered in favour of the respondent, but without costs.

The facts are stated in the judgment of their Lordships.

The question decided was whether the appellant, as holder of the office of Prosecutor for the Queen, came within the enacting clause, s. 107, of the Public Service Act of 1890, or the excluding clause, s. 3, both of which are sufficiently set forth in the said judgment.

Sect. 107 is substantially a re-enactment of analogous provisions contained in earlier Public Service Acts, namely, of s. 99 in Act No. 773 of 1883, and of s. 39 of No. 160 of 1862.

* *Present:* LORD MACNAGHTEN, LORD MORRIS, and SIR HENRY STRONG.

The above s. 3 re-enacts s. 3 of the Act of 1883, and s. 1 of the Act of 1862.

The judgment of the Full Court was delivered by à Beckett J. He held with regard to the Act No. 160 that Crown prosecutors and prosecuting barristers were totally distinct officers; that the latter words "aptly described the barristers occasionally employed, but did not aptly describe Crown prosecutors." He further held that various provisions of the Act, namely, as to classification, discipline, leave of absence, and superannuation, were wide enough to include the Crown prosecutors; that they could not be excluded without "words of exclusion." But he surmised that the framers of the Act had their exclusion in view as reasonable and proper, he considered that to express the exclusion of the occasionally employed barristers was absurd, and he held that the words used should therefore be taken to refer to the Crown prosecutors. He considered that those who had administered the Act had taken that view, and that Parliament, in enacting by Act No. 502 that the tenure of the office should be "during pleasure," must also have taken the same view.

Williams J. upon a later occasion said that he had grave doubts as to the correctness of this judgment. He agreed that the two classes of officers in question were totally distinct; that Parliament had uniformly so treated them; that for a considerable period of time Crown prosecutors need not have been barristers at all. These views, he said, would have led him to dissent from the view of the majority of the Court. He held that "prosecuting barristers" meant prosecutors for the Queen, because the latter were to hold office during pleasure. The reason assigned was that that circumstance was so inconsistent with many of the provisions relating to the Civil Service that Parliament could not have intended that any of those provisions, including those relating to pensions, should apply to the officers called "Prosecutors for the Queen."

Cowell, for the appellant, contended that the two classes of functionaries referred to were totally distinct, and had been treated as distinct in the Appropriation Acts, with totally

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different duties, modes of appointment, modes of remuneration, character and duration of their services. The appellant, having held the office of "Prosecutor for the Queen" until he was superannuated, was entitled to his pension by the plain words of s. 107. The holder of that office was not excluded by s. 3. The holder of the office of prosecuting barrister was excluded. The Court below was not justified by any known rule of construction in holding that, where the Act expressly excluded one officer, it in reality meant another and a totally different officer whom it had plainly omitted.

[He was stopped by their Lordships.]

Haldane, Q.C., and *Rowlatt* (*Bray, Q.C.*, with them), for the respondent, referred to the earlier Public Service Acts, and contended that the appellant was not subject to any of the provisions contained therein relating to the salaries, appointment, promotion, dismissal, and superannuation of officers of the Civil Service. By Act No. 502 he was placed on a different footing from them all, and directed to hold his office during pleasure. The Public Service Act, 1883, contained many provisions affecting the officers subject to it which were inapplicable to the appellant in respect of his office. He was never included in the classification and record prescribed by that Act. The fair construction of those Acts was that the appellant did not hold an office within the meaning of the sections relating to pensions. Moreover, he was a prosecuting barrister within the meaning of s. 3, and practised on his own account, and held briefs for the Crown as a prosecuting barrister, part of the duties of his office being to conduct criminal prosecutions. Holding office during pleasure, exempt from many provisions of the Acts, allowed to carry on private practice, and discharging the functions of a prosecuting barrister, he was reasonably and properly held to be excluded from the Act as coming within the term "prosecuting barrister."

Counsel for the appellant was not heard in reply.

1898 *Aug.* 3.

The judgment of their Lordships was delivered by

LORD MORRIS. In the present case the appellant appeals from a judgment of the Supreme Court of Victoria which

answered against the appellant the question reserved at the trial of this action, and from the order dated November 8, 1897, directing that judgment should be entered up for the respondent. The appellant's suit was by petition of right; he claimed to be entitled to superannuation allowance as the holder of an office in the public service for which he was superannuated; he had passed the age of sixty-five. The appellant had been appointed to his office of "Crown prosecutor" on April 7, 1861, for certain District Courts of the Colony. The appointment was as follows:—

"Whereas all treasons, felonies, misdemeanors, and offences cognizable in any Circuit Court in the Colony of Victoria must be prosecuted by information in the name of Her Majesty's Attorney-General or Solicitor-General in the said Colony, or of such other person as the Governor of the said Colony may appoint. Know ye, therefore, that I, the Governor aforesaid, do by these presents appoint that at the Circuit Courts to be holden at Sandhurst, Maryborough and Castlemaine all such treasons, felonies, misdemeanors, and offences as aforesaid shall be prosecuted in the name of Charles Alexander Smyth, Esquire, Barrister-at-Law."

The Appellant was subsequently appointed to an additional circuit. The duties of the said office of Crown prosecutor are set forth in the 7th paragraph of the appellant's petition of right. The salary given to this office was 600*l.* a year.

The appellant having declined to accept certain new conditions and duties proposed to be attached to his office, his tenure was by letter of the Attorney-General of January 17, 1895, terminated, and an Order of Council was made formally terminating the appellant's appointment. It appears that at an earlier period, namely, in 1890, the appellant had proposed to resign in consequence of ill-health on a retiring allowance, which was acceded to by the then Attorney-General, and the sum of 386*l.* 13*s.* 6*d.* was placed on the estimates for such retiring allowance; but the appellant's health became restored and he did not resign, but continued in his office.

On his removal in 1895 the appellant again applied for his superannuation allowance; but such application was refused,

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the Attorney-General having given an opinion that appellant was not entitled to any pension. The appellant consequently instituted the present proceedings. At the trial Sir H. Wrixon, a former Attorney-General, was examined, and gave evidence as to the duties of the appellant's office of "Crown prosecutor." It was found as a fact by the learned judge that the statements of the duties of appellant's office were correctly stated in the 7th paragraph of the petition of right. It was proved and it is conceded that there was a separate and distinct class of officers known as "prosecuting barristers." They are referred to in the Appropriation Acts as a distinct class. Their duties were simply to prosecute as advocates in the particular cases in which they might be employed. This case entirely turns upon the construction of the Public Service Act, 1890, namely, whether the appellant comes within clause 107, and, if he does, is he excepted by the excluding clause 3?

Sect. 107 says all persons classified or unclassified holding offices in any department of the public service at the time of the Public Service Act, 1883, should still be entitled to superannuation or retiring allowance, compensation or gratuity, to be computed under the provisions of Act No. 160.

Sect. 3 says, except where otherwise expressly provided, nothing in this Act shall apply to any prosecuting barrister, and in the interpretation clause it is provided that the expression "officer shall mean and include all persons employed in any capacity in the public service." Their Lordships are of opinion that the Crown prosecutors such as appellant, paid yearly, would come within and be included in the terms of s. 107—an opinion which was entertained by the Supreme Court also. The question in the case, therefore, is reduced to the construction of clause 3, namely, are Crown prosecutors excluded by the terms of that clause? They are not named in it, but it was contended that the words "prosecuting barristers" included and were meant to refer to "Crown prosecutors." Their Lordships cannot accede to such a construction. The learned judge who gave the judgment of the Supreme Court recognises that there were two well-recognised classes of functionaries whose titles were not used in common,

but, on the contrary, were described in official Acts and documents with separate references, and whose duties were dissimilar, except in one respect, the duties of the Crown prosecutor being of a much higher nature and employed at a salary; the point of similarity being that while the whole duty of a prosecuting barrister was to act as an advocate on getting a brief, it was one of the duties of a Crown prosecutor to prosecute in a case in which he had presented. Why, then, should an exclusion by name of a well-known class be held to be an exclusion of an equally well-known and distinct class whose duties are so dissimilar? The learned judge in the Supreme Court seems to have substantially decided on the ground that it could not be reasonably supposed the Legislature intended by the use of the words "prosecuting barristers" to refer to the class "prosecuting barristers," because they could not come within the other provisions of the Act. There may be some difficulty in assigning a reason why the class "prosecuting barristers" under such circumstances was excluded by name—whether ex majore cautela or why otherwise. However this may be, this difficulty appears to their Lordships to afford no ground for holding that the words are to be applied to another and distinct class of officers—namely, "Crown prosecutors." The learned judge was of opinion it was the class of Crown prosecutors that was aimed at in clause 3, and not the class named. If such surmise is to be entertained, it is sufficient to say the aim has not been attained. Their Lordships cannot adopt such a rule of construction as the Supreme Court have adopted in the present case. One distinct well-known class of official is stated to be excluded in plain, unmistakable language. Why should such exclusion, in consequence of its inapplicability to the class named, be transferred to another class not named?

Their Lordships are of opinion that the fact that the appellant held his office during pleasure cannot affect the question of superannuation. His term of office is determined by the will of the Crown. That does not affect his right to superannuation allowance for the term he held office. Their Lordships will humbly advise Her Majesty that the judgment of the Full

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Court and the order of the Supreme Court of November 8, 1897, ought to be reversed, and that in lieu thereof the appellant be declared entitled to superannuation allowance. The appellant will also be entitled to his costs in the Courts of the Colony and of this appeal.

Solicitors for appellant: *Baker & Nairne.*
Solicitors for respondent: *Freshfields & Williams.*

The Mode of Citation of the Volumes of the Law Reports, commencing January 1, 1898, will be as follows :—

In the First Series,
[1898] 1 Ch. [1898] 2 Ch.

In the Second Series,
[1898] 1 Q. B. [1898] 2 Q. B. [1898] P.

In the Third Series,
[1898] A. C.

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An act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as to make the doer of the act liable to a civil action.

Discussion of the cases in which evil motive is said to be an essential ingredient in a civil cause of action, such as malicious prosecution; see per Lord Watson, Lord Herschell, and Lord Davey, at pp. 92, 29, 125, 126, 173.

The respondents were shipwrights employed "for the job" on the repairs to the woodwork of a ship, but were liable to be discharged at any time. Some ironworkers who were employed on the ironwork of the ship objected to the respondents being employed, on the ground that the respondents had previously worked at ironwork on a ship for another firm, the practice of shipwrights working on iron being resisted by the trade union of which the ironworkers were members. The appellant, who was a delegate of the union, was sent for by the ironworkers and informed that they intended to leave off working. The appellant informed the employers that unless the respondents were discharged all the ironworkers would be called out or knock off work (it was doubtful which expression was used); that the employers had no option; that the iron-men were doing their best to put an end to the practice of shipwrights doing ironwork and that wherever the respondents were employed the iron-men would cease work. There was evidence that this was done to punish the respondents for what they had done in the past. The employers, in fear of this threat being carried out which (as they knew) would have stopped their business, discharged the respondents and refused to employ them again. In the ordinary course the respondents' employment would have continued. The respondents having brought an action against the appellant, the jury found that he had maliciously induced the employers to discharge the respondents and not to engage them, and gave the respondents a verdict for damages:—

Held, reversing the decision of the Court of Appeal, [1895] 2 Q. B. 21 (Lord Halsbury L.C. and Lords Ashbourne and Morris dissenting), that the appellant had violated no legal right of the respondents, done no unlawful act, and used no unlawful means, in procuring the respondents' dismissal; that his conduct was therefore not actionable however malicious or bad his motive might be, and that notwithstanding the verdict the appellant was entitled to judgment.

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The rule that specific performance cannot be granted in respect of a contract to lend money applies to a contract to lend to a company money, payable by instalments, upon the security of debentures to be issued by the company.

Where the lender makes default in payment, the moneys due for unpaid instalments do not constitute a debt to the company, and the company are only entitled to damages for the actual loss caused by the breach of contract.

The decision of the Court of Appeal, [1897] 1 Q. B. 692, affirmed. SOUTH AFRICAN TERRITORIES, LIMITED *v.* WALLINGTON H. L. (E.) 309

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—— Special leave to appeal—Condition as to costs—Practice - - - 718
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—— Liability for breach after lessor's death—Liability of lessor's general estate 360
See PRIVY COUNCIL APPEALS. 21.

CRIMINAL LAW—New Zealand Criminal Code—Marital coercion - - - 234
See PRIVY COUNCIL APPEALS. 20.

CROWN—Crown Lands Acts—Reference by Land Appeal Court to Supreme Court—Effect of decision - - 687
See PRIVY COUNCIL APPEALS. 12.

—— Crown Lands Act, 1884—Laws of New South Wales - - - 460
See PRIVY COUNCIL APPEALS. 13.

—— Crown Lands Act, 1889—Special case stated by Land Court—Duty of Supreme Court
See PRIVY COUNCIL APPEALS. 11. 343

—— Pension—Right to—Victoria Public Service Act, 1890—"Prosecutor for the Queen"
See PRIVY COUNCIL APPEALS. 26. 782

—— Priority of Crown debts—Debts due to Boards of Education—Laws of Newfoundland - - - - 667
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CURATOR BONIS—Investments—Liability—Judicial factor—Harbour rates - 289
See TRUSTEE.

CUSTODY—Infant—Practice—Irish Divorce Bill
See DIVORCE. 305

CUSTOMS TARIFF ACT, 1894—Laws of Canada—Date of importation of goods - 735
See PRIVY COUNCIL APPEALS. 2.

DAMAGES—Laws of Canada—New trial—Practice - - - - 742
See PRIVY COUNCIL APPEALS. 5.

—— Measure of—Breach of contract to pay instalments of loan - - - 309
See COMPANY.

—— Towage—Contract to exercise reasonable care and skill—Port and harbour authority - - - - 513
See SHIP. 2.

DEBENTURE—Specific performance—Agreement to lend money—Measure of damages - - - - 309
See COMPANY.

DESIGN—*Registration of Design—Applicable for Pattern—"New or Original"—"Pattern"—Marking Articles—Statutory Requirements—"All proper Steps"—Patents, Designs, and Trade*

DESIGN—*continued.*

Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 47, 51, 60—*Designs Rules*, 1890, *r.* 9.

The term "design" in s. 60 of the Patents, Designs, and Trade Marks Act, 1883, was not intended to be used in any technical sense as excluding anything that would ordinarily fall within it; and "pattern" as used in that section might include "shape" or "configuration" or "ornament."

The decision of the Court of Appeal, *In re Rollason's Registered Design*, [1898] 1 Ch. 237, affirmed. HEATH & SONS, LIMITED *v.* ROLLASON H. L. (E.) 499

DESIGNS RULES, 1890, r. 9 - - 499
See DESIGN.

DISMISSAL—Civil servant—Laws of New South Wales - - - - 469
See PRIVY COUNCIL APPEALS. 10.

DIVIDED PARISHES ACT—Settlement—Illegitimate pauper — Birthplace — Derivative settlement of parent - - 586
See POOR LAW.

DIVORCE—*Irish Divorce Bill—Infant—Custody—Practice.*

In an Irish divorce bill, although no separate action has been instituted in Ireland to obtain the custody of infant children after a decree for separation a mensâ et thoro has been pronounced, the House of Lords will sanction a clause giving the custody of the children to the innocent party.

Mrs. Addison's Case, (1801) Macq. Prac. H. L. p. 598, followed. HART'S DIVORCE BILL H. L. (D.) 305

DOMICIL—Laws of Queensland—Succession and Probate Duties Act, 1892—Succession defined - - - - 769
See PRIVY COUNCIL APPEALS. 23.

DRAIN—Repair of—Substituting new drain—Glasgow Police Acts - - 432
See SCOTTISH LAW. 2.

—— Sewer—Liability to repair - - 190
See LONDON.

DUTY—Laws of Queensland—Succession and Probate Duties Act, 1892 - 769
See PRIVY COUNCIL APPEALS. 23.

—— Public revenue - - - 535, 565
See REVENUE. 2, 3.

EASEMENT—*Tramway Agreement—Personal or Real Right—Removal of Tramway.*

Where a servitude, such as a right of way for a tramway, is claimed as having been granted by an instrument in writing subscribed by the proprietor of the land burdened, the fact that the dominant tenement has not been acquired at the date of the instrument cannot, after it has been actually acquired, prevent the servitude from becoming a legal accessory to the dominant tenement, provided the servitude was so used as to give reasonable notice of the burden to any person in whom the property of the land might subsequently become vested. And although the instrument granting the privilege was in terms which might appropriately be employed in the constitution of a personal obligation only, that is

EASEMENT—*continued.*

not conclusive against the constitution of a proper burden upon the land, if it be matter of reasonable inference from the terms of the document, or the circumstances of the case, that the constitution of a real servitude was what the parties contemplated.

An agreement between the proprietor of the estate of W., the feuars of part of that estate, and a railway company, provided for the use and construction by the railway company of a tramway through the lands of W., including the lands of the feuars:—

Held (Lord Morris dissenting), reversing the decision of the Court of Session, (1897) 24 R. 1148, that the privilege of working the tramway as long as it continued was intended to bind, and did bind, all singular successors of the feuars in their lands. NORTH BRITISH RAILWAY COMPANY *v.* PARK YARD COMPANY - H. L. (Sc.) 643

EDUCATION ACTS—Priority of Crown debts—Debts due to Boards of Education—Law of Newfoundland - - - 667
See PRIVY COUNCIL APPEALS. 17.

EMPLOYER—Maliciously inducing, to discharge servant—Interference with trade 1
See ACTION.

ENDOWED SCHOOLS ACTS—*Locus Standi of Petitioners—Ratepaying Parents of Scholars—Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *ss.* 19, 39.

In appeal from a scheme relating to a grammar school:—

Held, (1.) that the petitioners, who were ratepayers of the borough where the school was situate and parents of scholars attending the school, were not in either capacity persons directly affected by the scheme within the meaning of s. 39, and, therefore, had no locus standi for appeal;

(2.) that although an opinion of the commissioners that s. 19 applies is appealable, it is so only as mentioned in the Act, which requires that the petitioners be aggrieved by the scheme and not by the opinion on which it is founded;

(3.) that they were not so aggrieved, for, whether that opinion was right or wrong, the scheme having received the consents required by the section, was in either view in conformity with the Act. *In re* ENDOWED SCHOOLS ACT, 1869, 1873, AND 1874, AND *In re* A SCHEME RELATING TO GRAMMAR SCHOOL IN COLCHESTER P. C. 477

EQUITY OF REDEMPTION—Purchase of—Presumption of intention to keep alive security - - - - 321
See MORTGAGE.

FACTOR—*Pledge—Documents of Title—Foreign Arrestment—Conflict of Laws—Goods in Scotland—Factors Acts*, 1889, 1890 (52 & 53 *Vict. c.* 45, *ss.* 3, 9; 53 & 54 *Vict. c.* 40, *s.* 1).

Where goods are lodged in warehouses in Scotland a pledgee of the goods must, to make effective all real rights which depend on the constructive delivery of the goods, give notice of the pledge to the warehouse-keeper.

The Factors Act, 1892, extended to Scotland

FACTOR—*continued.*
by the Factors (Scotland) Act, 1890, enacts—s. 3: "A pledge of the documents of title to goods shall be deemed to be a pledge of the goods"; and s. 1: "For the purposes of this Act" (sub-s. 5) "The expression 'pledge' shall include any contract, pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability." Sect. 9 prescribes that the effect of delivery or transfer of the documents of title of the goods under any pledge, &c., by a person who having bought the goods obtains with the consent of the seller possession of the goods or documents of title, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

Goods were stored by G., a domiciled Englishman, in a bonded warehouse in Glasgow, transferred into the name of G. as owner; and the warehouse-keeper issued to G. delivery orders shewing that the goods were held to G.'s order "or assigns by indorsement hereon." G. obtained a loan from I., an English merchant, and delivered to him in England a letter of hypothecation bearing that he deposited a part of the goods with him in security, with power of sale, and G. indorsed and handed to I. the delivery warrants. I. did not intimate or give notice of the right he had acquired to the warehouse-keeper. R. & B., claiming as personal creditors of G., arrested the goods in the hands of the warehouse-keeper in order to found jurisdiction against G. in Scotland; and then raised an action against him in the Scottish Court, upon dependence of which they again arrested the goods, claiming through the arrestment a preferable right thereto:—

Held, affirming the decision of the majority of the whole Scottish judges, (1897) 24 R. 758, that the case was governed by the law of Scotland, and that the right of the pledgee, I., in the goods was defeated by the arrestment executed by R. & B., I. not having intimated his pledge to the warehouse-keeper:

Held, also, that s. 3 of the Factors Act, 1889, was merely intended to define the full effect of the pledge of the documents of title made by a mercantile agent, and that it had no application to the case of the pledge of the documents of title by one in the position of G., who was not a mercantile agent within the meaning of the Act; nor was G. a pledgor within s. 9 of the same Act. INGLIS *v.* ROBERTSON AND BAXTER **H. L. (Sc.) 616**

FACTORY—Refuse—Duty of local authority to make sewers—Remedy for default—Mandamus - - - - **387**
See LOCAL GOVERNMENT.

FISHERIES — British North America Act—Rivers and lake—Fishing rights **700**
See PRIVY COUNCIL APPEALS. 1.

FOOTPATH—Bridge—Mandamus - - **210**
See RAILWAY. 1.

FOREIGN ARRESTMENT—Pledge—Documents of title—Conflict of laws—Goods in Scotland - - - - **616**
See FACTOR.

FOREIGN MANUFACTURER—Posting patented article to England—Infringement **200**
See PATENT. 1.

FOREIGN SECURITY—Made or issued in United Kingdom—Stamp duty - - **565**
See REVENUE. 2.

FORFEITURE—Power of Minister to declare a forfeiture of conditional purchases—Law of New South Wales - - **460**
See PRIVY COUNCIL APPEALS. 13.

FRAUD—Law of New South Wales—Act of bankruptcy—Indirect motive of petitioner—Fraud - - - **720**
See PRIVY COUNCIL APPEALS. 8.

GLASGOW POLICE ACTS—Repair of drain—Substituting new drain - - **432**
See SCOTTISH LAW. 2.

HARBOUR AUTHORITY—Towage—Damage—Contract to exercise reasonable care and skill - - - - - **513**
See SHIP. 2.

HARBOUR RATES—Investment—Judicial factor—Curator bonis—Liability - **289**
See TRUSTEE.

HERITABLE SECURITY—Investments—Judicial factor—Curator bonis—Liability **289**
See TRUSTEE.

—— Stamp—Conveyance on sale—Heritable Securities (Scotland) Act, 1894 - **399**
See REVENUE. 1.

HOTCHPOT CLAUSE—Construction of will **506**
See WILL. 2.

HOUSE OF LORDS—*Practice—House of Lords' Decision—Res Judicata—Tramways Act* 1870 (33 & 34 *Vict. c.* 78) *s.* 43.

A decision of the House of Lords upon a question of law is conclusive and binds the House in subsequent cases. An erroneous decision can be set right only by an Act of Parliament. LONDON TRAMWAYS COMPANY *v.* LONDON COUNTY COUNCIL - - - - **H. L. (E.) 375**

—— Practice—Set-off of costs - - **307**
See PRACTICE. 1.

HUSBAND AND WIFE—Laws of Jersey—Deed of settlement by wife's father—Rights of husband and wife in settled estate—Claim of husband's heir - - **777**
See PRIVY COUNCIL APPEALS. 7.

—— Marital coercion—New Zealand Criminal Code - - - - - **234**
See PRIVY COUNCIL APPEALS. 20.

IDENTIFICATION—Of name with goods by user—Trade name—Injunction - **239**
See PRIVY COUNCIL APPEALS. 16.

ILLEGITIMACY—Settlement of poor—Illegitimate pauper—Birthplace—Derivative settlement of parent - - **586**
See POOR LAW.

INCOME TAX—Laws of Victoria - - **758**
See PRIVY COUNCIL APPEALS. 27.

INFANT—Custody—Irish Divorce Bill—Practice - - - - - 305
See DIVORCE.

INFRINGEMENT—Posting patented article to England—Foreign manufacturer 200
See PATENT. 1.

INJUNCTION—Trade name — Identification of name with goods by user - - 239
See PRIVY COUNCIL APPEALS. 16.

INJURY—Intent to injure—Maliciously inducing employer to discharge servant - 1
See ACTION.

INSURANCE, MARINE—*Collision Clause—Construction of Proviso "that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers."*

A collision clause in a policy of marine insurance, covering damages payable in respect of a collision with another vessel, contained a proviso "that this clause shall in no case extend to any sum which the assured may become liable to pay or shall pay for removal of obstructions under statutory powers." The insured vessel came into collision with another vessel, which sank and was removed as an obstruction by commissioners under statutory powers. Both vessels were to blame for the collision. The owners of the insured vessel paid as damages to the owners of the sunken vessel a moiety of the sum which the latter had paid to the commissioners for the expenses of the removal, and made a claim upon the underwriters in respect of the moiety:—

Held, that the proviso must be construed as a business document prepared by men of business for their own use, and as business men would understand it: that it was not confined to payments made directly by the assured to the persons who caused the obstruction to be removed, but included indirect payments such as the moiety in question, and that the underwriters were not liable.

The North Britain, [1894] P. 77, approved. TATHAM, BROMAGE & Co. *v.* BURR. THE "ENGINEER" - - - H. L. (E.) 382

2. —— *Valued Policy — Constructive total Loss.*

Where a ship has been sunk in deep water, the underwriters cannot escape liability as for a total constructive loss by gratuitously intervening and taking upon themselves, between the date of notice of abandonment and the time when legal proceedings are commenced under the policy, the expenses of raising the insured vessel and saving her from being a constructive total loss. And such a gratuitous expenditure will not relieve the underwriters from their contractual liability.

The test whether a ship has become a constructive total loss is the same in English as in Scottish law, although these laws may differ in regard to the date at which the test ought to be applied. In considering whether a constructive total loss has occurred, the question is whether a shipowner of ordinary prudence and uninsured would have gone to the expense of raising a sunken ship and repairing her.

A ship insured under a valued policy was struck by a squall and sunk in harbour. The underwriters received notice of abandonment from the insured; but before action brought they, by a large expenditure of their own, raised the ship and claimed that, as the ship could at the date of the action have been repaired by the expenditure of less money than her total value, the loss was not a total but a partial one:—

Held, reversing the decision of the Second Division of the Court of Session, (1897) 24 R. 893, that the underwriters could not change a constructive total loss into a partial loss by intervening and raising the ship at their own expense. SAILING SHIP "BLAIRMORE" COMPANY *v.* MACREDIE - - - H. L. (Sc.) 593

INVESTMENT—Judicial factor—Curator bonis—Liability—Harbour rates - 289
See TRUSTEE.

—— Laws of Victoria—Trustees' powers of investment—Deposits with banks - 763
See PRIVY COUNCIL APPEALS. 24.

IRISH DIVORCE BILL—Infant — Custody — Practice - - - - 305
See DIVORCE.

JERSEY—Laws of - - - - 777
See PRIVY COUNCIL APPEALS. 7.

JOINT STOCK COMPANIES ARRANGEMENT ACT, 1870—Inapplicable to the Colonies
See PRIVY COUNCIL APPEALS. 25. 349

JUDICIAL FACTOR—Investments—Curator bonis—Liability—Harbour rates - 289
See TRUSTEE.

JURISDICTION—Bankruptcy judge—Registrar's judgment inadmissible - - 720
See PRIVY COUNCIL APPEALS. 8.

—— Decisions of the House of Lords not reviewable by the House in later cases - 375
See HOUSE OF LORDS.

—— Service of writ out of—Contract - 524
See PRACTICE. 2.

—— To rehear—Right of appeal—Laws of New Zealand - - - - 748
See PRIVY COUNCIL APPEALS. 22.

LANDLORD AND TENANT—*Lease—Landlord's Rates and Taxes—Tramway—Covenant by Tenant to keep free from all Expenses whatever—Valuation of Lands (Scotland) Act*, 1854 (17 & 18 *Vict. c.* 91), *s.* 6.

By s. 6 of the Valuation of Lands (Scotland) Act, 1854, it is enacted that a tenant whose name has been entered in the valuation roll as proprietor "shall be entitled to relief from the actual proprietor thereof, and to deduction from the rent payable by him to such actual proprietor of such proportion of all assessments laid on upon the valuations of such lands and heritages made under this Act, and payable by such lessee as proprietor in the sense of this Act, as shall correspond to the rent payable by such lessee to such actual proprietor as compared with the amount of such valuation."

The corporation of Glasgow agreed to borrow

LANDLORD AND TENANT—*continued.*

money and to construct certain tramways in Glasgow and lease the undertaking to the Glasgow Tramway Company for twenty-three years. The company agreed to make various payments to the corporation, and then agreed as follows: "And the company shall also pay to the corporation the expenses of borrowing, management, &c., and this provision shall be so construed as to keep the corporation free from all expenses whatever in connection with the said tramways." The lease exceeding twenty-one years, the company, under the Valuation of Lands (Scotland) Act, 1854, s. 6, became primarily liable to pay and did pay during the whole term of the lease, "owner's assessments, rates, and taxes," amounting in the aggregate to over 14,000*l.* During the currency of the lease the company intimated to the corporation that they had a claim in this respect, but did not make any deduction from the rent when paid. The company contended that the corporation ought to reimburse them these outgoings, or such other sum as might be ascertained to be the amount of owner's assessments, rates, and taxes paid by the company during the lease:—

Held, reversing the decision of the First Division of the Court of Session, (1897) 24 R. 628, that the assessments, rates, and taxes, whether imperial or local, levied on the owner in respect of a tramway or other erection in solo, were an expense connected with the tramway or erection, and that the company were bound by their lease to relieve the corporation from these expenses, and were not entitled to claim reimbursement. GLASGOW CORPORATION *v.* GLASGOW TRAMWAY AND OMNIBUS COMPANY - H. L. (Sc.) 631

—— Covenant—Liability for breach after lessor's death — Liability of lessor's general estate - - - - 360
See PRIVY COUNCIL APPEALS. 21.

LANDS CLAUSES ACTS—*Compensation*—"*Part of House*"—*Material Detriment to remainder*—*Access over Land taken*—*Railway Company*—"*Road*"—*Power of Company to grant Right of Way*—*Arbitration*—*Finality of Scottish Award*—*Right of one Tenant in Common*—*Lands Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 19), *s.* 90—*Railways Clauses Consolidation (Scotland) Act* (8 & 9 *Vict. c.* 33), *ss.* 46, 49, 60.

A railway company were entitled by a section in their special Act, notwithstanding s. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, to take a portion of certain houses or other buildings or manufactories scheduled in their Act without being obliged to take the remainder, if the portion taken could, in the opinion of the authority to whom the question of disputed compensation should be submitted, be severed from the remainder of the property without material detriment thereto. The company gave notice to treat for 232 square yards, a portion of the scheduled property, which formed an access used jointly by the respondents and another firm. The respondents required the railway company to take the whole of their property. A statutory submission to arbitration containing the question, whether or not the portion of land containing the 232 square yards could be severed from the

LANDS CLAUSES ACTS—*continued.*

remainder of the property of the respondents without material detriment, reserving only the question whether s. 90 of the Lands Clauses Consolidation (Scotland) Act, 1845, applied, was entered into. Before the arbitrator the railway company offered to allow access to the remainder of the respondents' property under a bridge over the portion taken. The arbitrator found that the portion containing 232 square yards could not be severed without material detriment to the remainder of the respondents' property, and awarded compensation upon the assumption that the company were bound to take the whole premises. In an action to recover the amount awarded:—

Held, affirming the judgment of the Second Division of the Court of Session, that whether the arbitrator was right or wrong in declining to take the offer of the company into consideration in assessing the compensation, his award, until set aside by a proper process, was binding on the Court, and could not be reviewed.

Gonty v. *Manchester, Sheffield and Lincolnshire Ry. Co.*, [1896] 2 Q. B. 439, distinguished. CALEDONIAN RAILWAY COMPANY *v.* TURCAN
H. L. (Sc.) 256

—— Superfluous lands—Land adjoining terminus —Lease of portion - - - 270
See RAILWAY. 2.

LEASE—Covenant—Liability for breach - 360
See PRIVY COUNCIL APPEALS. 21.

—— Landlord's rates and taxes—Tramway—Covenant by tenant to keep free from all expenses whatever - - 631
See LANDLORD AND TENANT.

LEGACY—Charge of legacies on real estate if personal estate insufficient—Intention
See WILL. 1. 181

LIABILITY—Defective wagons while in use by another railway company - - 216
See NEGLIGENCE.

—— To repair—Sewer—Drain - - 190
See LONDON.

LOCAL GOVERNMENT—*Sewers*—*Factory Refuse*—*Duty of Local Authority to make Sewers*—*Remedy for Default*—*Mandamus*—*Complaint to Local Government Board*—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 299—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *s.* 7.

The duty of a local authority, under s. 15 of the Public Health Act, 1875, to make such sewers as may be necessary for effectually draining their district for the purposes of that Act, cannot be enforced by an action for mandamus brought by a private person: the only remedy for neglect of the duty is that given by s. 299 of the Act, a complaint to the Local Government Board.

The decision of the Court of Appeal in *Peebles* v. *Oswaldtwistle Urban District Council*, [1897] 1 Q. B. 625, affirmed. PASMORE *v.* OSWALDTWISTLE URBAN DISTRICT COUNCIL
H. L. (E.) 387

LOCUS STANDI — Petitioners — Ratepaying parents of scholars - - 477
See ENDOWED SCHOOLS ACTS.

LONDON—*Sewer—Drain—Liability to Repair—Sewer made without Approval of Vestry or Metropolitan Board of Works—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 74, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 47, 48, 61.

The fact that the requisite sanction and approval for the making of a sewer in the metropolis was not obtained from the vestry or Metropolitan Board of Works does not prevent it, when made, from being a sewer within the meaning of the Metropolis Management Acts, and as such vested in the vestry and repairable by them.

In 1866 the owner of a block of houses in the metropolis laid down a pipe to carry off the drainage from them, and connected the pipe with a sewer belonging to the vestry in a neighbouring street. There was no evidence of any notice having been given to the vestry, or of any order having been made by them, or of their sanction or of the approval of the Metropolitan Board of Works having been obtained, under the Metropolis Management Act 1855 or the Amendment Act 1862:—

Held, that the probable inference of fact was that the pipe was laid with the sanction of the vestry and the approval of the Metropolitan Board of Works required by the Acts; but that whether that was so or not the pipe was a sewer within the meaning of s. 250 of the Act of 1855, and was consequently vested in the vestry and repairable by them.

The decision of the Court of Appeal, [1896] 2 Q. B. 319, affirmed. BETHNAL GREEN VESTRY *v.* LONDON SCHOOL BOARD - H. L. (E.) 190

MALICE—Maliciously inducing employer to discharge servant—Intent to injure 1
See ACTION.

MANDAMUS—Footpath—Bridge - - 210
See RAILWAY. 1.

—— Sewers—Duty of local authority to make—Remedy for default - - 387
See LOCAL GOVERNMENT.

MARINE INSURANCE—Collision clause—Construction of proviso - - 382
See INSURANCE, MARINE.

MARITAL COERCION—New Zealand Criminal Code - - - - - 234
See PRIVY COUNCIL APPEALS. 20.

MARRIED WOMAN—Laws of Jersey—Deed of settlement by wife's father—Rights of husband and wife in settled estate—Claim of husband's heir - - 777
See PRIVY COUNCIL APPEALS. 7.

——Marital coercion—New Zealand Criminal Code - - - - 234
See PRIVY COUNCIL APPEALS. 20.

MASTER AND SERVANT—Maliciously inducing employer to discharge servant—Intent to injure - - - - 1
See ACTION.

METROPOLIS MANAGEMENT ACTS—Sewer—Drain—Liability to repair - 190
See LONDON.

MORTGAGE—*Purchase of Equity of Redemption—Payment of Mortgage Debt by Purchaser—Presumption of Intention to keep alive Security.*

The purchaser of an equity of redemption took an assignment of a charge upon the property and paid off the incumbrancer. There being no evidence in the deed or the circumstances of any intention to extinguish the charge and it being for the purchaser's benefit to keep it alive:—

Held, reversing the decision of the Court of Appeal, [1896] 1 Ch. 726, that the charge was not extinguished. LIQUIDATION ESTATES PURCHASE COMPANY *v.* WILLOUGHBY H. L. (E.) 321

MUNICIPAL CORPORATION—Harbour rates—Investment—Curator bonis—Liability
See TRUSTEE. 289

NATIVE LAND COURTS ACTS—Laws of New Zealand - - - - 748
See PRIVY COUNCIL APPEALS. 22.

NEGLIGENCE — *Defective Railway Wagons—Breach of Duty—Liability of Railway Company for their own defective Wagons while in use by another Railway Company—Relevancy.*

Wagons belonging to the Caledonian Railway Company were filled with coal from pits on that railway company's system, and delivered to the Glasgow and South Western Railway Company at Dumfries Station, who had an agreement with the Gas Commissioners of Dumfries to haul the coal from the station to the gasworks. The station and the gasworks were connected by the Gas Commissioners' tramway line running along a public street. The Glasgow and South Western supplied the men and horses to haul the wagons, and once the wagons left the Caledonian Company's system they were not under their control. In conducting the wagons into the gasworks, two wagons at a time were taken along the tramway; but owing to a descent and ascent, one of the wagons was as usual uncoupled at the top of the descent, and the other taken on at a sharp trot to rush the ascent. While this was being done an obstruction got in the way, and the first wagon had to be pulled up; but the brake of the second wagon refused to act, and the husband of the respondent, who was in the employ of the Glasgow and South Western Railway Company, was caught between the two wagons and killed. The respondent raised this action against both railway companies, and the question was whether there was a relevant case made against the Caledonian Railway Company. There was no averment as to the state of the wagons before they left the Caledonian Railway Company's system:—

Held, reversing the decision of the Second Division of the Court of Session, that the respondent's averments did not shew that there was any duty cast on the Caledonian Railway Company in respect to any one using the wagons on behalf of the Glasgow and South Western Railway Company to take care that the wagons were in proper order after the coal had been delivered at Dumfries Station; and therefore the Caledonian Railway Company must be dismissed from the action.

Heaven v. *Pender*, (1883) 11 Q. B. D. 503,

NEGLIGENCE—*continued.*
distinguished. CALEDONIAN RAILWAY COMPANY *v.* MULHOLLAND OR WARWICK H. L. (Sc.) 216

NEWFOUNDLAND—Priority of Crown debts—Debts due to Boards of Education 667
See PRIVY COUNCIL APPEALS. 17.

NEW SOUTH WALES—Law of 239, 343, 457, 460, 469, 661, 679, 687, 720
See PRIVY COUNCIL APPEALS. 8—16.

NEW TRIAL—Laws of Canada—Practice—Verdict—Judgment—Damages - 742
See PRIVY COUNCIL APPEALS. 5.

NEW ZEALAND—Laws of - 234, 360, 442, 693, 748
See PRIVY COUNCIL APPEALS. 18—22.

NULLUM TEMPUS ACT—Laws of New South Wales - - - - 679
See PRIVY COUNCIL APPEALS. 14.

ONTARIO—Laws of - - 247, 447, 700
See PRIVY COUNCIL APPEALS. 1, 3, 4.

PATENT—*Infringement—Foreign Manufacturer—Sale of Patented Article Abroad and Delivery in England—Posting Patented Article to England—Transporting Patented Article within the United Kingdom—User.*

A trader in England ordered goods from a foreign manufacturer in Switzerland to be sent by post to England. The manufacturer addressed the goods to the trader in England and delivered them to the Swiss Post Office, by whom they were forwarded to England. The goods were manufactured according to an invention protected by an English patent:—

Held, that since the contract of sale was completed by delivery to the Post Office in Switzerland, and since the Post Office was the agent of the buyer and not of the vendor, the vendor had not made, used, exercised or vended the invention within the ambit of the patent, and that the patentee had no right of action against the vendor for an infringement of the patent.

The decision of the Court of Appeal, [1897] 2 Ch. 322, affirmed. BADISCHE ANILIN UND SODA FABRIK *v.* BASLE CHEMICAL WORKS, BINDSCHEDLER H. L. (E.) 200

2. —— *Prolongation—Five Years' Prolongation—Inadequate Remuneration.*

Where an invention was of conspicuous merit, and it appeared that as regards its application to one of its purposes the patentee had received for an exclusive licence to use it certain shares in companies formed for that purpose, the value of which shares was largely dependent on the prolongation of the patent, and that with respect to its application to all other purposes the patentee, who had done his best to push his invention, had received nothing at all if the accounts were made up on the basis of a reasonable allowance to himself for his services in working his patents:—

Held, that the patentee, who had fairly kept and presented his accounts, should be allowed a five years' prolongation. *In re* PARSONS' PATENT P. C. 673

PATENT—*continued.*

3. —— *Prolongation of Term for Ten Years—New Patent.*

Where it appeared that an invention was of considerable merit, that there were great difficulties in introducing it, and that the petitioner had incurred loss in his endeavours so to do, their Lordships recommended a new patent for the term of ten years. *In re* CURRIE AND TIMMIS' PATENT - - - - - P. C. 347

PATENTS OF PRECEDENCE—Power to issue—Powers of provincial legislature - 247
See PRIVY COUNCIL APPEALS. 3.

PATTERN—Registration of design - 499
See DESIGN.

PENSION—Right to—Victoria Public Service Act, 1890—"Prosecutor for the Queen"—"Prosecuting barrister" - 782
See PRIVY COUNCIL APPEALS. 26.

PLEDGE—Document of title—Foreign arrestment—Conflict of laws—Goods in Scotland - - - - - 616
See FACTOR.

POLICY—Valued policy—Constructive total loss
See INSURANCE, MARINE. 2. 593

POOR LAW—*Settlement—Illegitimate Pauper—Birthplace—Derivative Settlement of Parent—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

On inquiry as to the place of settlement of an illegitimate pauper, it was proved that the pauper was born in P. and the pauper's mother in S., and that neither of them had acquired a settlement of her own. Facts were proved upon which the Court held that the father of the pauper's mother had a settlement and that the pauper's mother derived that settlement from him, but did not make the necessary inquiries to ascertain what that settlement was, and adjudged that the pauper's settlement was in P. where she was born:—

Held, affirming the decision of the Court of Appeal, that the adjudication was right; that the case came within the 3rd paragraph of s. 35 of the Divided Parishes Act, 1876, and that since it could not be shewn what settlement the pauper derived from her mother without inquiring into the derivative settlement of the mother, the pauper must be deemed to be settled in the parish where she was born. PLYMOUTH UNION *v.* AXMINSTER UNION - - H. L. (E.) 586

PORT—Harbour authority—Damage—Towage—Contract to exercise reasonable care and skill - - - - - 513
See SHIP. 2.

POST—Posting patented article to England—Infringement - - - 200
See PATENT. 1.

POUTUTU JURISDICTION ACT—Laws of New Zealand—Native Land Courts Act 748
See PRIVY COUNCIL APPEALS. 22.

PRACTICE—*Costs—Set-off—House of Lords—Rules of Supreme Court*, 1883, *Order* LXV., *r.* 14.

The Appeal Committee after final judgment has been given in the appeal will not set off costs due by an appellant in the House of Lords

PRACTICE—*continued.*
against balance costs due to the appellant as the result of a decision in the Court of Appeal. If there is a probability of any question of costs or any other matter arising after and as incident to the appeal, the matter ought to be mentioned at the hearing. RUSSELL *v.* RUSSELL
H. L. (D.) 307

2. —— *Service of Writ out of Jurisdiction—Contract "which, according to the terms thereof, ought to be performed within the Jurisdiction—Rules of Supreme Court*, 1883, *Order* XI., *r.* 1 (*e*).
In order to allow service of a writ out of the jurisdiction under Order XI., r. 1 (*e*), the contract for breach of which the action is brought must be one which, according to the terms thereof, must be performed within the jurisdiction. Leave cannot be given in a case where the contract may be performed either within or out of the jurisdiction.
Where the defendant abroad contracted to sell goods sent to him and remit the proceeds to England by bills, and he sold the goods and kept the proceeds:—
Held, that since his contract could all be performed abroad, no writ could be issued here for service abroad, either for breach of contract or for money had and received.
The decision of the Court of Appeal reversed. COMBER *v.* LEYLAND AND BULLINS H. L. (E.) 524

—— Appeal—Special leave to—Condition as to costs - - - - - 718
See PRIVY COUNCIL APPEALS. 6.

—— Leave to appeal granted under misapprehension of fact - - - 234
See PRIVY COUNCIL APPEALS. 20.

—— New trial—Verdict—Judgment—Damages—Laws of Canada - - - 742
See PRIVY COUNCIL APPEALS. 5.

PRESUMPTION—Of intention to keep alive security—Purchase of equity of redemption - - - - - 321
See MORTGAGE.

—— Of law rebutted by intention - - 181
See WILL. 1.

PRIORITY—Crown debts—Debts due to Boards of Education—Laws of Newfoundland
See PRIVY COUNCIL APPEALS. 17. 667

PRIVY COUNCIL APPEALS—CANADA—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *ss.* 91, 92, 108—*Distribution of Legislative Power—Construction—Rivers and Lake Improvements—"Public Harbours"—Fisheries and Fishing Rights—Revised Statutes of Canada, c.* 92, *c.* 95, *s.* 4—*Revised Statutes of Ontario, c.* 24, *s.* 47—*Ontario Act of* 1892 (55 *Vict. c.* 10).
Whatever proprietary rights vested in the provinces at the date of British North America Act, 1867, remained so unless by its express enactment transferred to the Dominion. Such transfer is not to be presumed from the grant of legislative jurisdiction to the Dominion in respect of the subject-matter of those proprietary rights:—
Held, that the transfer by s. 108 and the 5th clause of its schedule to the Dominion of "rivers and lake improvements" operates on its true construction in regard to the improvements only both of rivers and lakes, and not in regard to the entire rivers. Such construction does no violence to the language employed, and is reasonably and probably in accordance with the intention of the Legislature:
Held, that the transfer of "public harbours" operates on whatever is properly comprised in that term having regard to the circumstances of each case, and is not limited merely to those portions on which public works had been executed.
With regard to fisheries and fishing rights:—
Held, (1.) that s. 91 did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enables it to affect those rights to an unlimited extent, short of transferring them to others.
(2.) a tax by way of licence as a condition of the right to fish is within the powers conferred by sub-ss. 4 and 12.
(3.) the same power is conferred on the Provincial Parliament by s. 92.
(4.) Revised Statutes of Canada, c. 95, s. 4, so far as it empowers the grant of exclusive fishing rights over provincial property, is ultra vires the Dominion.
(5.) Revised Statutes of Ontario, c. 24, s. 47, is with a specific exception intra vires the province.
As regards Ontario Act, 1892, the regulations therein which control the manner of fishing are ultra vires. Fishing regulations and restrictions are within the exclusive competence of the Dominion; see s. 91, sub-s. 12. *Secus* with regard to any provisions relating thereto which would properly fall under the headings "Property and Civil Rights" or "The Management and Sale of Public Lands":—
Held, further, that the Dominion Legislature had power to pass Revised Statutes of Canada, c. 92, intituled "An Act respecting certain Works constructed in or over Navigable Waters." ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *v.* ATTORNEYS-GENERAL FOR THE PROVINCES OF ONTARIO, QUEBEC, AND NOVA SCOTIA. ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO *v.* ATTORNEY-GENERAL FOR THE DOMINION OF CANADA. ATTORNEYS-GENERAL FOR THE PROVINCES OF QUEBEC AND NOVA SCOTIA *v.* ATTORNEY-GENERAL FOR THE DOMINION OF CANADA
P. C. 700

2. —— *Customs Tariff Act*, 1894 (57 & 58 *Vict. c.* 33), *s.* 4—*R. S. C.* (1886) 49 *Vict. c.* 32, *s.* 150—*Construction—Date of Importation of Goods.*
Held, that by the true construction of the Customs Tariff Act, 1894, s. 4, as amended by the Tariff Act, 1895, which in effect directs that duty be paid upon raw sugar "when such goods are imported into Canada or taken out of warehouse for consumption therein," the date at which duty both attaches thereto and becomes payable is when the goods are landed and delivered to the importer or to his order, or, when they are taken out of warehouse, if instead of being delivered they have been placed in bond.
Sect. 150 of the Customs Act, 1886, which

PRIVY COUNCIL APPEALS—CANADA—*contd.*
directs that the precise time of the importation of goods shall be deemed to be the time when "they came within the limits of the port at which they ought to be reported," refers on its true construction to the port at which the goods are to be landed—that is, where the effective report is to be made. Such construction is required in order to place a consistent, rational, and probable meaning on the context and other clauses of the Act. CANADA SUGAR REFINING COMPANY *v.* THE QUEEN - - - - - **P. C. 735**

3. —— *Ontario—British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 92, *sub-ss.* 1, 4, 14—*Powers of Provincial Legislature—Revised Statutes of Ontario*, 1877, *c.* 139—*Provincial Bar—Power to issue Patents of Precedence.*

Held that, according to the true construction of the British North America Act, 1867, s. 92, sub-ss. 1, 4, and 14, Revised Statutes of Ontario, 1877, c. 139, which empowers the Lieutenant-Governor of the province to confer precedence by patents upon such members of the bar of the province as he may think fit to select, is intra vires of the provincial legislature. ATTORNEY-GENERAL FOR THE DOMINION OF CANADA *v.* ATTORNEY-GENERAL FOR THE PROVINCE OF ONTARIO **P. C. 247**

4. —— *Ontario—Company—Statutory Duties of a Corporation—Breach—Cause of Action.*

Where by an Act extending the powers of the respondent company certain duties and obligations were imposed on it for the benefit of its customers with a view to the reduction of the price of gas contingent on the amount of surplus net profit, but no pecuniary penalty was imposed for default and no right of action given to persons aggrieved, provision however being made for its accounts being audited by direction of the mayor of the corporation with whose assent the company was originally established:—

Held, that no individual customer had a right of action against the company for non-compliance with the provisions of the Act. Such a right only arises where given by the Act, and especially so where the Act as in this case is in the nature of a private legislative bargain, and not one of public and general policy. JOHNSTON AND THE TORONTO TYPE FOUNDRY COMPANY *v.* CONSUMERS' GAS COMPANY OF TORONTO - - **P. C. 447**

5. —— *Practice—New Trial—Verdict—Judgment—Damages.*

Where a jury found (1.) that the death of the plaintiff's wife had been accelerated, but not to any appreciable extent, by taking a dose of tartar emetic negligently supplied by the defendants; (2.) that the plaintiff had suffered no damage thereby, but that his minor child had incurred damage to the extent of $1000:—

Held, that the action must be dismissed, because the damages attributable to the defendants were on those findings (which could not properly be disturbed) inappreciable and irrecoverable.

The Court of Queen's Bench was in error in directing a new trial on the assumption that the findings as to damages are contradictory and illogical. KERRY *v.* ENGLAND - **P. C. 742**

PRIVY COUNCIL APPEALS—CANADA—*contd.*

6. —— *Practice—Special Leave to Appeal—Condition as to Costs.*

Special leave to appeal may be given on terms that the appellants should be liable to pay the respondent's costs in any event. MONTREAL GAS COMPANY *v.* CADIEUX. *Ex parte* MONTREAL GAS COMPANY - - - - **P. C. 718**

7. —— **JERSEY**—*Deed of Settlement by Wife's Father—Rights of Husband and Wife in Settled Estate—Claim of Husband's Heir.*

By the law of Jersey a conveyance of real estate by a husband to his wife, stante matrimonio, to the prejudice of his lawful heirs is invalid.

Where, by a deed of family arrangement, it appeared that a husband and his wife, separated quant aux biens, each took from her father (subject to a charge of an annuity in his favour) a conjoint interest in the settled lands during their joint lives, with the chance of the fee on survivorship:—

Held, that the deed was in no sense a conveyance by the husband of any interest acquired by him thereunder; and that on his death before his wife his interest ceased and could not pass to his heirs. BROOMER *v.* ARTHUR - **P. C. 777**

8. —— **NEW SOUTH WALES**—*Act of Bankruptcy—Jurisdiction of Bankruptcy Judge—Rule of Procedure, No.* 51, *ultra vires — Registrar's Judgment inadmissible — Indirect Motive of Petitioner—Fraud.*

Under the New South Wales Bankruptcy Acts, 1887–8, an act of bankruptcy may be constituted by non-compliance with a bankruptcy notice under s. 4, sub-s. 2, of the principal Act. Ample discretion is vested in the judge to grant or refuse a sequestration order founded on the notice, and if granted to discharge or annul it. But no jurisdiction is given by the Acts to annul an act of bankruptcy or declare that it never was committed; and cannot be given by a rule of procedure framed under s. 119, which on its true construction does not authorize a rule purporting to create a jurisdiction in excess of that conferred by the Act.

The "full written judgment" of the registrar whose order refused the respondent's petition of sequestration against the appellant was rightly held to be inadmissible in evidence in an action against the respondent for having maliciously presented his petition. The respondent was bound by the registrar's discretion as to making or refusing the order, not by his opinion upon points which he had no jurisdiction to determine.

Ex parte Vitoria, [1894] 2 Q. B. 387, approved.

It is neither fraud nor an abuse of process to petition for a sequestration order with an indirect motive, that is, for a purpose other than the equal distribution of the testator's assets, as, for example, to exclude the appellant from a partnership; *secus* if such order would in the circumstances be unsuitable, and enable the petitioner fraudulently to defeat the rights of others whether legal or equitable.

Ex parte Wilbran, (1820) 5 Madd. 1, approved. KING *v.* HENDERSON - - - **P. C. 720**

9. —— *Civil Servant—Civil Service Act*, 1884

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

(48 *Vict. No.* 24), *ss.* 10, 46—*Abolition of Office—Compensation.*

Although New South Wales "Civil Service Act, 1884," deprives the Crown of its right to dismiss its civil servants summarily without following the procedure prescribed therein, yet it does not take away the right of the Crown to abolish a civil office.

Held, that the holder of an abolished office, unless entitled to a superannuation allowance under the Act of 1884, is not by the true construction of ss. 10 and 46 entitled as for breach of contract to any other compensation. It is at the option of the Government whether he should be offered an equivalent office. YOUNG *v.* WALLER P. C. 661

10. —— *Civil Servant—Dismissal of — New South Wales Act* (59 *Vict. c.* 25), s. 58—*Construction—Retrospective Effect.*

Retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language.

Midland Ry. Co. v. *Pye*, (1861) 10 C. B. (N.S.) 191, approved:—

Held, that the New South Wales Act (59 Vict. c. 25), s. 58, which enacts that "Nothing in this Act or in the Civil Service Act of 1884 shall be construed or held to abrogate and restrict the right of the Crown as it existed before the passing of the said Civil Service Act to dispense with the services of any person employed in the public service," is not retrospective in its operation:

Held, that the respondent, who had been dismissed from the public service before the said Act came into operation, but not in manner prescribed by the Act of 1884, was not affected by the provisions of the later Act, which only apply to persons actually employed in the public service at and after the date thereof. YOUNG *v.* ADAMS P. C. 469

11. —— *Crown Lands Act*, 1889 (53 *Vict. No.* 21), *s.* 8, *sub-s.* 6—*Special Case stated by Land Court—Duty of Supreme Court—Law of New South Wales.*

Held, that under the Crown Lands Act of 1889, s. 8, sub-s. 6, it is the duty of the Supreme Court to hear a case stated by the Land Court in pursuance of that sub-section, and to return it to the Land Court with a decision on the question submitted. The Land Court has jurisdiction to state it; and if stated without due precision, the Supreme Court can return it for amendment. HILL, CLARK & CO. *v.* DALGETY & CO. P. C. 343

12. —— *Crown Lands Acts — Reference by Land Appeal Court to Supreme Court—Effect of Decision.*

In a suit by the respondent against the appellant to recover certain lands, it appeared that in an appeal to the Land Court to which the respondent and the Minister for Lands were parties, and of which the appellant had notice as a party interested, a reference was made to the Supreme Court, which decided that at the date of the appellant's application for them the lands were not Crown lands, and therefore not open for selection:—

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

Held, that this decision was conclusive and could not be reopened. GARNSEY *v.* FLOOD P. C. 687

13. —— *Forfeiture—Crown Lands Act*, 1884 (48 *Vict. No.* 18), *s.* 13, *sub-s.* 2; *ss.* 14, 18, 19, 20, 39—*Power of the Minister to Declare a Forfeiture of Conditional Purchases—Finality of Finding of Land Board.*

Held, that any reference to the Land Board on an issue of fact which, if found against the conditional purchaser, involves the forfeiture of his purchase, must, even if framed under s. 13, sub-s. 2, of the Crown Lands Act of 1884, be tried in manner prescribed by s. 14, and that the finding thereon is final under s. 20.

If the finding is that the statutory requirements have not been complied with, s. 39 gives a discretionary power to the Minister to declare a forfeiture. That power is not swept away by the Act of 1889, which established a Land Court to hear appeals from the Land Board in lieu of the Minister to whom such appeals lay under ss. 18 and 19 of the Act of 1884. ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* WALTERS - P. C. 460

14. —— *Nullum Tempus Act* (9 *Geo.* 3, *c.* 16) *applies to the Colony*—9 *Geo.* 4, *c.* 83.

Held, that the Imperial Nullum Tempus Act (9 Geo. 3, c. 16) is in force in New South Wales; and that it applies to lands which have never been dealt with by the Crown.

9 Geo. 4, c. 83, primâ facie on its true construction applies that Act to the Colony. Its operation to that effect cannot be restricted by confining the laws and statutes thereby applied to those relating to procedure; or by shewing that a specific exception in the applied Act preserving the Crown's right could not operate in the circumstances of the Colony. ATTORNEY-GENERAL FOR NEW SOUTH WALES *v.* LOVE P. C. 679

15. —— *Streets—Public Works Act*, 1888 (51 *Vict. No.* 37)—*Sydney Corporation Act of* 1879 (43 *Vict. No.* 3), *s.* 67—*Construction—Vesting—Diverting a Street into a Tramway not a taking of Property for Public Purposes.*

Held, that diverting a street into a tramway is not a taking of property within the meaning of the New South Wales Public Works Act:

Held, further, that the Sydney Corporation Act of 1879, which vests public ways in the municipal council, does not so vest them in proprietary right, which alone gives claim for compensation, but only for purposes incidental to the exercise of municipal authority. MUNICIPAL COUNCIL OF SYDNEY *v.* YOUNG - - - P. C. 457

16. —— *Trade Name*—"*Flaked Oatmeal*"—*Term of ordinary Description—Identification of Name with Goods by User—Injunction.*

Where the plaintiffs without relying on their registered trade-mark, which consisted in part of the term "Flaked Oatmeal," claimed that they had by user so intimately identified the term with their goods that the use of it by the defendants in their trade-mark had the effect of passing off their goods as the plaintiffs' goods:—

Held, that the term being one of ordinary and not exclusive description, and being applicable to

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

the defendants' goods as well as the plaintiffs', and the defendants' user thereof not having been proved to have had or to be calculated to have the above effect, the suit must be dismissed with damages resulting from the grant of an interim injunction.

Reddaway v. *Banham*, [1896] A. C. 199, approved. PARSONS *v.* GILLESPIE - P. C. 239

17. —— **NEWFOUNDLAND**—*Bank—Priority of Crown Debts*—58 *Vict. c.* 3—*Debts due to Boards of Education*—*Education Acts of* 1892 *and* 1893.

A Newfoundland Act, 58 Vict. c. 3, passed for the winding-up and liquidation of a bank, provided that priority be given to all debts and claims due to the Crown or to the Government or revenues of the Colony:—

Held, that balances in the books of the bank to the credit of the various boards of education in the Colony were not such debts and claims as aforesaid. It appeared that the boards were not constituted by the Education Acts of 1892 and 1893 mere agents of the Government, but had a discretionary power, independent of the Government, in expending such balances. FOX *v.* GOVERNMENT OF NEWFOUNDLAND - P. C. 667

18. —— **NEW ZEALAND**—*Banker and Customer—Account not earmarked as Trust Account—Set-off.*

Where a company received from the respondents trust moneys paid them to the credit of a separate account between it and the appellant bank, and failed:—

Held, in an action by the respondents, that, as the bank was not shewn to have received the moneys as trust funds, or to have received during the currency of the account notice of their trust character, the bank was entitled to set them off against its own claim against the company in liquidation. UNION BANK OF AUSTRALIA, LIMITED *v.* MURRAY-AYNSLEY - - - P. C. 693

19. —— *Contract—Construction—"Use."*

The respondents contracted with the appellants not to "erect or assist, or be in any way concerned or interested in the erection of or use of freezing works at Bluff," and thereafter contracted with W. first to purchase all frozen meat produced at his works at Bluff, and secondly to purchase his works at the expiration of their contract with the appellants, together with additional works to be completed by that date:—

Held, that neither of these contracts with W. was a breach of the contract with the appellants, by the true construction whereof use means the manufacturing use, and does not include the uses contemplated by the respondents in either of their purchases. SOUTHLAND FROZEN MEAT AND PRODUCE EXPORT COMPANY *v.* NELSON BROTHERS, LIMITED, - - - - - P. C. 442

20. —— *Husband and Wife—Marital Coercion—Leave to Appeal granted under Misapprehension of Fact—Practice—New Zealand Criminal Code*, 1893 (57 *Vict. No.* 56), *s.* 24.

Where the jury found that the prisoner, a married woman, had acted under her husband's control in the commission of an offence, for which they were jointly charged but separately tried,

PRIVY COUNCIL APPEALS—NEW ZEALAND—*continued.*

but it appeared that there was no evidence to that effect, and that the question should not have been left to the jury:—

Held, that whatever the true effect of s. 24 of the New Zealand Criminal Code as to marital compulsion, leave to appeal from an order affirming the conviction had been granted under a misapprehension of fact, and that the appeal must be dismissed. BROWN *v.* ATTORNEY-GENERAL FOR NEW ZEALAND - - - P. C. 234

21. —— *Landlord and Tenant—Covenant by Lessor—Construction as to whether it runs with the Reversion—Liability for Breach after Lessor's death—Liability of Lessor's general Estate—Rights of Specific Devisees of Reversion.*

A lease under seal contained a covenant by the lessor to finish laying down 1000 acres, part of the land demised, in good English grass within a year. The deed contained a subsequent declaration "that there shall not be implied in this lease any covenant or provision whatever on the part of either of the parties hereto":—

Held, that the covenant must be construed as qualified and controlled by the declaration. Accordingly, it did not run with the reversion; and, not being incident to the relation of landlord and tenant, liability for breach thereof properly fell to be borne by the general estate of the deceased lessor.

Even if, as held by the Court below, it was unqualified and ran with the reversion, it was not a charge thereon. As between the specific devisees of the reversion and the general estate, the latter should primarily bear a liability which in its nature is not incident to the relation of landlord and tenant, but was incurred preparatory thereto. ECCLES *v.* MILLS - - P. C. 360

22. —— *Poututu Jurisdiction Act*, 1889 (53 *Vict. No.* 7)—*Effect of Proceedings in the Validation Court—Native Land Courts Acts*, 1886 *and* 1888 (50 *Vict. No.* 24), *ss.* 75, 78; (52 *Vict. No.* 37), *s.* 24—*Jurisdiction to rehear—Right of Appeal.*

The presumption is that a subsequent general enactment is not intended to interfere with a special enactment, unless the intention so to do is very clearly manifested:—

Held, that current proceedings in the Native Land Court under a specially enabling Act called the New Zealand Poututu Jurisdiction Act, 1889, were not stayed by the commencement of proceedings in the Validation Court; notwithstanding the general provision contained in the Act establishing the latter Court to the effect that commencement of proceedings therein shall operate as a stay of proceedings in any other Court in respect of the same matters:

Held, also, that the jurisdiction to rehear—that is to entertain an appeal—given by the Native Land Courts Acts of 1886 and 1888 is not confined to cases where the title to particular land has been the only question decided by the Court of First Instance; but extends to cases where the decision is embodied in the same decree with other matters not of an appealable nature.

Under the special Poututu Act orders as to

PRIVY COUNCIL APPEALS—NEW ZEALAND —*continued.*

title to land are also appealable in the same way; and *held* accordingly that the appellant was entitled thereunder to a rehearing of judgments concerning the title to Pototutu lands, and that the Native Land Court had jurisdiction to grant such rehearing, proceedings therein not being stayed by the respondents' commencement of proceedings in the Validation Court. BARKER *v.* EDGER - - - - - **P. C. 748**

23. —— **QUEENSLAND**—*Succession and Probate Duties Act*, 1892 (56 *Vict. No.* 13), *s.* 4—*Succession defined—Movables locally situated in the Colony—Domicil of the Testator.*

Held, that s. 4 of the Queensland Succession and Probate Duties Act, 1892, defining a "succession" (being the same as s. 2 of the English Succession Duty Act of 1853) must be read in the sense affixed to the English Act by the English tribunals; and that it does not include movables locally situated in Queensland which belonged to a testator whose domicil was in Victoria:

Held, further, that the Amendment Act of 1895, s. 2, is not retrospective in its operation. HARDING *v.* COMMISSIONERS OF STAMPS FOR QUEENSLAND - - - - **P. C. 769**

24. —— **VICTORIA**—*Companies Act*, 1890 (54 *Vict. No.* 1074), *s.* 384—*Trustees' Powers of Investment—Deposits with Banks.*

Sect. 384 of the Victoria Companies Act, 1890, while authorizing the employment of bankers, does not on its true construction enlarge the powers of investment possessed by trustee companies in common with other trustees.

Held, that the appellant company was not authorized thereunder, or under its special Act, to invest trust moneys on deposit at interest with banks. PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA *v.* SWAN **P. C. 763**

25. —— *Company—Scheme of Arrangement — Effect of — Imperial Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104), *inapplicable to the Colonies — Non-assenting Victorian Creditor.*

Held, that the Joint Stock Companies Arrangement Act, 1870, does not apply to the Colonies.

Accordingly a scheme of arrangement thereunder sanctioned by an English Court is quoad the Colonies a proceeding in a foreign court, and cannot be pleaded by the company in a Victorian Court as a defence to an action by a non-assenting Victorian creditor for the full amount of her claim.

Gibbs v. *Societé des Métaux*, (1890) 25 Q. B. D. 399, approved. NEW ZEALAND LOAN AND MERCANTILE AGENCY COMPANY *v.* MORRISON **P. C. 349**

26. —— *Pension—Right to—Victoria Public Service Act*, 1890 (54 *Vict. No.* 1133), *ss.* 3, 107 — "*Prosecutor for the Queen*" — "*Prosecuting Barrister*"—*Construction.*

Held, that the appellant was entitled under s. 107 of the Public Service Act, 1890, to superannuation allowance by virtue of having held the office of "Prosecutor for the Queen" notwithstanding that he held during pleasure.

Held, further, that he was not excluded therefrom as a "prosecuting barrister" within the meaning of the excluding clause (s. 3).

It appearing that the two classes of functionaries were totally distinct, there is no rule of construction to the effect that when one only is named the other is meant or included. SMYTH *v.* THE QUEEN - - - - **P. C. 782**

27. —— *Victorian Income Tax Act*, 1895 (58 *Vict. No.* 1374), *ss.* 5, 7, *sub-s.* 3—*Construction—Trusts.*

Held, that the appellant company, which carried on insurance business with strangers for gain to the company as a whole, but had not its principal office in Victoria, was by s. 5 of the Victorian Income Tax Act, 1895, liable to income tax on the proceeds from money lent on the security of land in Victoria.

It could not claim exemption under s. 7 (*e*), which exempts trusts and all associations not carrying on trade for purposes of gain to be divided amongst the members; for besides granting assurances to persons not its members, it trafficked in reversions, while "trusts" on its true construction means associations acting in or for Victoria. ENGLAND *v.* WEBB - **P. C. 758**

PROLONGATION—Patent—Five years' prolongation inadequate remuneration **673**
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—— Patent—New patent - - - **347**
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See PRIVY COUNCIL APPEALS. 23.

RAILWAY — *Footpath — Bridge — Mandamus—Railways Clauses Consolidation Act* 1845 (8 & 9 *Vict. c.* 20) *ss.* 46, 49, 50, 61.

Sect. 46 of the Railways Clauses Consolidation Act 1845 does not impose upon a railway company, whose line crosses a public footpath, the obligation of carrying the footpath over the railway or the railway over the footpath by means of a bridge.

The decision of the Court of Appeal, [1896] 2 Q. B. 74, affirmed. DARTFORD RURAL DISTRICT COUNCIL *v.* BEXLEY HEATH RAILWAY COMPANY **H. L. (E.) 210**

2. —— *Superfluous Lands—Land adjoining Terminus—Negotiations by Railway Company to Sell—Lease of Portion—Lands Clauses Consolidation (Scotland) Act*, 1845 (8 & 9 *Vict. c.* 19), *s.* 120.

The directors of a railway company, before the expiration of ten years from the time limited by the special Act for the completion of their works, considered proposals for the purchase from the company of land adjoining one of their

RAILWAY—*continued.*
terminal stations, and after the ten years had expired they also considered proposals, and eventually leased a portion for the building of a district post-office. The adjoining landowner claimed the land as "superfluous land" within the meaning of s. 120 of the Lands Clauses (Scotland) Act, 1845:—

Held, affirming the decision of the First Division of the Court of Session, (1897) 34 S. L. R. 828, that whether the land had become superfluous or not was a question of mixed law and fact; and that on the evidence the land had not become superfluous.

London and South Western Ry. Co. v. *Blackmore*, (1870) L. R. 4 H. L. 610, distinguished. MACFIE *v.* CALLANDER AND OBAN RAILWAY COMPANY - - - - H. L. (Sc.) 270

—— Compensation—"Part of house"—Material detriment to remainder - - 256
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—— Liability of company for defective wagons in use by another railway company 216
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REAL OR HERITABLE SECURITY—Investments—Judicial factor—Curator bonis—Liability - - - - 289
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REDEMPTION—Purchase of equity of—Presumption of intention to keep alive security - - - - 321
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REGISTRATION—Design—Applicable for pattern—"New or original" - - 499
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—— "Invented word"—"Reference to the character or quality of the goods" 571
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RELEVANCY—Defective wagons while in use by another railway company—Liability
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REPAIRS—Drain—Substituting new drain—Glasgow Police Acts - - 432
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—— Sewer made without approval of vestry—Liability - - - - 190
See LONDON.

RES JUDICATA—House of Lords' decision—Practice - - - - 375
See HOUSE OF LORDS.

REVENUE—*Stamp—Conveyance on Sale—Ad Valorem Duty—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57—*Heritable Securities (Scotland) Act*, 1894 (57 & 58 *Vict. c.* 44), *ss.* 8, 9.

A bond and disposition in security contained a power of sale. The creditor exposed for sale the property held in security at a price less than the amount due under his security, and failed to find a purchaser. The creditor then applied to the sheriff under s. 8 of the Heritable Securities (Scotland) Act, 1894, and the sheriff issued a decree that the debtors had forfeited their rights of redemption, and that the creditor was vested absolutely in the subjects at the price named:—

Held, reversing the decision of the First Division of the Court of Session, that the transaction constituted a sale to the creditor, and was chargeable, by virtue of ss. 54 and 57 of the Stamp Act, 1891, and the first schedule thereto, with ad valorem duty. INLAND REVENUE COMMISSIONERS *v.* TOD - - H. L. (Sc.) 399

2. —— *Stamp Duty—Foreign Security made or issued in United Kingdom—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 82, *sub-s.* 1 (*b*) (i.).

Bonds of a foreign company payable to bearer were executed by the company abroad and delivered abroad to a foreign trustee for the bondholders. The bonds were expressed not to be valid for any purpose unless authenticated by the certificate of the trustee. Some of the bonds were sent to England and the trustee having come to England there certified them and delivered them to the persons entitled to them:—

Held, that since the bonds were not marketable till they were certified, the bonds certified in England were "marketable securities by a foreign company which were made and issued in the United Kingdom" within the meaning of the Stamp Act 1891 s. 82 sub-s. 1 (*b*) (i.) and liable to the stamp duty imposed by that Act upon such securities.

The decision of the Court of Appeal, *Baring* v. *Commissioners of Inland Revenue*, [1898] 1 Q. B. 78, affirmed. LORD REVELSTOKE *v.* INLAND REVENUE COMMISSIONERS - H. L. (E.) 565

3. —— *Succession Duty—New Succession—"Alienation"—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 15, 17, 18.

A peer bequeathed his residuary personal estate in trust for his wife for life and after her death in trust for the person who should then be his right heir absolutely. After his death five nieces became his co-heiresses, and the appellant, a nephew, succeeded to the title. In order to make provision for the title a deed of family arrangement was executed whereby the testator's widow assigned her interest in bank shares (part of the testator's residuary estate), and the co-heiresses and the appellant respectively assigned their contingent reversionary interests in the residue, to trustees in trust by clause 1 during the widow's life to pay out of the income of the bank shares an annuity of 15,000*l.* to the appellant and other annuities to the co-heiresses; and by clause 2 after the widow's death to pay out of the income of the whole residue an annuity of 15,000*l.* to the person for the time being holding the title, with other payments to the co-heiresses and provisions for keeping up the title. The widow died and the co-heiresses paid legacy duty at 3 per cent. on the whole residue. The Crown having claimed succession duty at 6⅔ per cent. from the appellant in respect of his annuity under clause 2 of the deed:—

Held, that the Court of Appeal was right in holding that the annuity was not payable under

REVENUE—*continued.*

"a contract made for valuable consideration in money or money's worth" within s. 17 of the Succession Duty Act 1853; and wrong in holding that the deed created a new succession; that the case fell under s. 15 and was one of "alienation" of part of the succession created by the testator's will, whereby the duty payable in respect of the annuity was at the same rate and time as would have been payable if the annuity had not been created; but that as legacy duty had been paid upon the whole residue out of which the annuity was carved, s. 18 applied and no succession duty would have been payable by the co-heiresses if the annuity had not been created, and therefore that the effect of ss. 15 and 18 together was that no succession duty was payable by the appellant in respect of the annuity.

The decision of the Court of Appeal, [1897] 1 Q. B. 231, reversed.

In re Cooper and Allen's Contract, (1876) 4 Ch. D. 802, commented on. BARON WOLVERTON *v.* ATTORNEY-GENERAL - H. L. (E.) 535

—— Laws of Queensland — Succession and Probate Duties Act, 1892—Succession defined - - - - 769
See PRIVY COUNCIL APPEALS. 23.

REVERSION—Construction as to whether covenant by lessor runs with the—Liability
See PRIVY COUNCIL APPEALS. 21. 360

RIGHT OF WAY—Power of company to grant—Access over land taken - - 256
See LANDS CLAUSES ACTS.

RIVERS POLLUTION ACT—Factory refuse—Duty of local authority to make sewers—Remedy for default—Mandamus 387
See LOCAL GOVERNMENT.

RULES OF SUPREME COURT:—

—— **Order XI., r. 1** (*e*)—*Service out of Jurisdiction* - - - - - 524
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—— **Order LXV., r. 14**—*Costs* - - 307
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SALVAGE—Amount—Salving vessels specially equipped - - - - 519
See SHIP. 3.

SCHEME OF ARRANGEMENT—Joint Stock Companies Arrangement Act, 1870, inapplicable to the Colonies - 349
See PRIVY COUNCIL APPEALS. 25.

SCOTTISH LAW—*Boundary Wall—Mutual Gable—Half Cost of Erection.*

The proprietor of two adjoining building plots erected a house upon one of them, building the whole gable half upon one plot and half upon the other plot. He afterwards conveyed the plot with the house upon it to A. The mutual gable, resting partly on the two plots, was described in the conveyance as a mutual gable. He subsequently sold the other plot, and the purchaser proceeded to erect a house upon it, making use of the mutual gable. In the letters of sale to A. the vendor said: "The unused half of the gable and boundary walls is not included in the offer." In an action by A.'s successor against the purchaser of the second plot for half the cost of the mutual gable wall, the defendant relied upon the words of the letters as shewing that A. had not acquired the claim for recompense for the unused half of the gable:—

Held, affirming the decision of the Second Division of the Court of Session, that A.'s successor was entitled to claim from the purchaser of the second plot one-half of the value of the mutual gable, and that there was no inconsistency between the letters of sale and the words of the conveyance. BAIRD *v.* BELL OR ALEXANDER H. L. (Sc.) 420

2. —— *Sewerage and Drainage—Repair of Drain—Substituting new Drain—Glasgow Police Act*, 1866 (29 & 30 *Vict. c. cclxxiii.*), *ss.* 332, 335—*Glasgow Police* (*Amendment*) *Act*, 1890 (53 & 54 *Vict. c. ccxxi.*), *s.* 16—*Judicature* (*Scotland*) *Act*, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40.

In cases arising in the Sheriff Court and appealed to the Court of Session the interlocutor of the Court of Session must contain all the findings of fact; for, if a fact is not found by the interlocutor appealed against, the House of Lords must, unless the parties agree to the fact not found, remit the cause to the Court of Session to find the fact in question.

Sect. 16 of the Glasgow Police (Amendment) Act, 1890, enacts that if the drains of any house, &c., are found to be defective, the owner of the premises shall be bound, immediately on an "order to that effect being given by the Police Commissioners, to carry out all necessary operations for removing defects of structure, or doing such acts as may be requisite to prevent risk to health, and, failing compliance with such order, the Police Commissioners may execute the work and recover the expense thereof as damages from the owner."

The commissioners having found that the drains of a block of houses were defective issued an order to the owners to repair the same, and, they having made default, the commissioners proceeded to execute the work themselves; but, instead of repairing the old drain, they constructed a new drain on a different site and outfall into the main sewer. In an action for the expenses, the Court of Session assoilzied the owners upon the ground that s. 16 of the Act of 1890 did not warrant the formation of a new system of drainage. This House having remitted the case to the Court of Session to find whether the commissioners had considered that the new drainage was necessary, the Court found that part of the drainage had been considered necessary, but the rest had not:—

Held, varying the decision of the Second Division of the Court of Session, under the name of *The Glasgow Police Commissioners* v. *M'Omish and Arthur*, (1896) 23 R. 896, that the part considered necessary must be paid for by the owners, but not the rest. GLASGOW CORPORATION *v.* M'OMISH AND ARTHUR - - H. L. (Sc.) 432

—— Arbitration—Finality of Scottish award—Right of one tenant in common - 256
See LANDS CLAUSES ACTS.

—— Easement—Tramway agreement—Personal or real right—Removal of tramway 643
See EASEMENT.

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—— Landlord's rates and taxes—Tramway—Covenant by tenant to keep free from all expenses whatever - - 631
See LANDLORD AND TENANT.

—— Pledge—Document of title—Foreign arrestment—Conflict of laws—Goods in Scotland - - - - - 616
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—— Stamp—Conveyance on sale—Heritable Securities (Scotland) Act, 1894 - 399
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—— Superfluous lands—Land adjoining terminus—Lease of portion - - 270
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—— Trustee—Investments—Liability - 289
See TRUSTEE.

—— Valued policy—Constructive total loss 593
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SERVANT—Maliciously inducing employer to discharge—Interference with trade 1
See ACTION.

SERVICE—Writ out of jurisdiction—Contract "which, according to the terms thereof, ought to be performed within the jurisdiction" - - - - 524
See PRACTICE. 2.

SET-OFF—Account not earmarked as trust account—Banker and customer - 693
See PRIVY COUNCIL APPEALS. 18.

—— Costs—House of Lords - - 307
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SETTLEMENT—Laws of Jersey—Deed of settlement by wife's father—Rights of husband and wife in settled estate—Claim of husband's heir - - - 777
See PRIVY COUNCIL APPEALS. 7.

SETTLEMENT OF POOR—Illegitimate pauper—Birthplace—Derivative settlement of parent - - - - 586
See POOR LAW.

SEWER—Drain—Liability to repair - 190
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—— Factory refuse—Duty of local authority to make sewers—Remedy for default—Mandamus - - - - 387
See LOCAL GOVERNMENT.

—— Repair of drain—Substituting new drain—Glasgow Police Acts - - 432
See SCOTTISH LAW. 2.

SHIP — *Charterparty — Ship to Load "always afloat as and where ordered by Charterers"—Insufficient Depth of Water in Dock—Detention of Ship.*

A charterparty provided that a ship should proceed to a named dock and "there load in the customary manner (Sundays and holidays excepted) always afloat as and where ordered by the charterers, a cargo of rails." The depth of water in the dock varied with the tides and was sufficient at spring tides, but not at neap tides, for a ship of the size of the chartered vessel to load there always afloat, and this was within the knowledge of the owners and of the charterers. The ship having arrived in the dock the charterers ordered her to a berth where the loading began and continued for several days; then the water began to fall, and to avoid taking the ground the ship was compelled to leave the dock. After several days she returned with the spring tides and completed her loading. The shipowners having sued the charterers for demurrage or damages:—

Held, affirming the decision of the Court of Appeal, [1897] 2 Q. B. 485, that the charterers were not bound to do that which (as was known to the shipowners) might be physically impossible, namely order the ship when she arrived to a berth where she could then load continuously always afloat, and that they were not responsible for delay occasioned by natural and physical causes beyond their control. CARLTON STEAMSHIP COMPANY *v.* CASTLE MAIL PACKETS COMPANY - - - - H. L. (E.) 486

2. —— *Harbour Authority—Towage—Damage—Contract to exercise reasonable Care and Skill—Port and Harbour Authority.*

The appellants undertook for payment to tow the respondents' vessel with others by hired tugs up a tidal river, to lighten the respondents' vessel if necessary, and to conduct the whole operation of the towage upon a certain tide, including the arrangement of the time and order of procession, the river being too narrow for two vessels to go abreast or pass one another. The tug towing the leading vessel was so slow and inefficient that the respondents' vessel, which was the last in the line, was stranded on the ebb tide and damaged:—

Held, that the appellants were bound to exercise reasonable care and skill in the conduct of the towage, and that, there being evidence of failure in that respect, the respondents were entitled to sue the appellants for damages.

The decision of the Court of Appeal, [1897] P. 118, affirmed. PRESTON CORPORATION *v.* BIORNSTAD. THE "RATATA" - H. L. (E.) 513

3. —— *Salvage — Amount — Salving Vessels specially equipped.*

In reviewing an award for salvage made by the judge of the Admiralty Division and affirmed by the Court of Appeal this House will not interfere with the amount awarded unless it appears that the established principles have not been satisfactorily applied.

The decision of the Court of Appeal, [1898] P. 97, affirmed. OWNERS OF THE "GLENGYLE," HER CARGO AND FREIGHT *v.* NEPTUNE SALVAGE COMPANY, OWNERS OF THE "HERMES" AND "NEWA." THE "GLENGYLE" - H. L. (E.) 519

—— Marine insurance—Collision clause—Construction of proviso - - 382
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I. IMPERIAL STATUTES.

9 Geo. 3, c. 16—*Nullum Tempus* - 679
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6 Geo. 4, c. 120, s. 40—*Judicature (Scotland) Act* - - - - - 432
See SCOTTISH LAW. 2.

9 Geo. 4, c. 83—*Australian Courts* - 679
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8 & 9 Vict. c. 19, s. 90—*Lands Clauses, Scotland* - - - - - 256
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—— —— s. 120 - - - - 270
See RAILWAY. 2.

8 & 9 Vict. c. 20, ss. 46, 49, 50, 61—*Railways Clauses* - - - - 210
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8 & 9 Vict. c. 33, ss. 46, 49, 60—*Railways Clauses, Scotland* - - - 256
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16 & 17 Vict. c. 51, ss. 2, 15, 17, 18—*Succession Duty* - - - - - 535
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17 & 18 Vict. c. 91, s. 6—*Valuation of Lands (Scotland)* - - - - 631
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18 & 19 Vict. c. 120, ss. 68, 69, 74, 250—*Metropolis Management* - - - 190
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25 & 26 Vict. c. 102, ss. 47, 48, 61—*Metropolis Management* - - - 190
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29 & 30 Vict. c. cclxxiii. ss. 332, 335—*Glasgow Police* - - - - 432
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32 & 33 Vict. c. 56, ss. 19, 39—*Endowed Schools*
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33 & 34 Vict. c. 78, s. 43—*Tramways* - 375
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33 & 34 Vict. c. 104—*Joint Stock Companies Arrangement* - - - 349
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38 & 39 Vict. c. 55, ss. 15, 299—*Public Health*
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39 & 40 Vict. c. 61, s. 35—*Divided Parishes*
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39 & 40 Vict. c. 75, s. 7—*Rivers Pollution Prevention* - - - - 387
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52 & 53 Vict. c. 45, ss. 3, 9—*Factors* - 616
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Revised Statutes of Canada, c. 92—*Works in Navigable Waters* - - - 700
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Revised Statutes of Canada, c. 95, s. 4—*Fisheries* - - - - 700
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Revised Statutes of Ontario, c. 24, s. 47—*Public Lands* - - - 700
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48 Vict. No. 18, s. 13, sub-s. 2; ss. 14, 18, 19, 20, 39—*Crown Lands* - - 460
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51 Vict. No. 37—*Public Works* - - 457
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50 Vict. No. 24, ss. 75, 78—*Native Land Courts*
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53 Vict. No. 7—*Poututu Jurisdiction* - 748
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57 Vict. No. 56, s. 24—*Criminal Code* - 234
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Queensland, Statutes of:

56 Vict. No. 13, s. 4—*Succession and Probate Duties* - - - - 769
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54 Vict. No. 1074, s. 384—*Companies* - 763
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54 Vict. No. 1133, ss. 3, 107—*Public Service*
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58 Vict. No. 1374, ss. 5, 7, sub-s. 3—*Income Tax* - - - - - 758
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STREET—Diverting a street into a tramway not a taking of property for public purposes—Laws of New South Wales - 457
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SUPERFLUOUS LANDS—Land adjoining terminus—Lease of portion - - 270
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TENANT—Covenant by tenant to keep free from all expenses whatever—Tramway 631
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TERMINUS—Land adjoining—Lease of portion—Superfluous lands - - 270
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TOWAGE—Damage—Contract to exercise reasonable care and skill—Port and harbour authority - - - - 513
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TRADE—Interference with—Maliciously inducing employer to discharge servant 1
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TRADE-MARK—*Registration*—"*Invented Word*"—"*Reference to the Character or Quality of the Goods*"—*Costs of Registration and Appeal*—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *s.* 64, *sub-s.* 1, *as amended by Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-s.* 1.

A word which is "an invented word" within the meaning of clause (*d*) of s. 64, sub-s. 1, of the Patents, Designs, and Trades Marks Act, 1883, as amended by the Patents &c. Act, 1888, s. 10, sub-s. 1, may be registered as a trade-mark, although it "has reference to the character or quality of the goods" within clause (*e*). Clauses (*d*) and (*e*) are independent of each other.

The word "Solio" *held* to be capable of registration as a trade-mark under class 39 in respect of photographic paper, and the decision of the Court of Appeal reversed.

The term "invented word" discussed.

In re Farbenfabriken Application, [1894] 1 Ch. 645, overruled. EASTMAN PHOTOGRAPHIC MATERIALS COMPANY *v.* COMPTROLLER-GENERAL OF PATENTS, DESIGNS, AND TRADE MARKS
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—— Diverting a street into a tramway not a taking of property for public purposes
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TRUSTEE — *Investments* — *Judicial Factor* — *Curator bonis*—*Liability*—*Real or heritable Security*—*Debenture*—*Municipal Corporation Rates*—*Harbour Rates*—*Trusts (Scotland) Amendment Act*, 1884 (47 & 48 *Vict. c.* 63), *s.* 3, *sub-ss.* 10, 12—*Judicial Factors Act*, 1849 (12 & 13 *Vict. c.* 51), *ss.* 4, 13.

The accountant of court, Scotland, who, as to this matter, fills a similar position to that of a Master of Chancery under the Judicial Trustee Rules, 1897, has no power to approve of an improper investment.

By s. 3, sub-s. 10, of the Trusts (Scotland)

TRUSTEE—*continued.*
Amendment Act, 1884, trustees, including judicial factors and curators bonis, are authorized to lend trust money in loans on real or heritable security; and by sub-s. 12, in loans on debentures secured on rates or taxes levied under statutory power by municipal corporations:—

A curator bonis invested his ward's money on a bond of the Greenock Harbour Trustees, a corporation consisting of the magistrates, the council, and elected trustees. As security, the trustees assigned to the curator bonis the "rates and duties and other revenues of the harbour," but no right of obtaining possession of the works on default of payment was given. The accounts of the curator bonis were audited by the accountant of court and passed without comment. The harbour trustees made default in payment of interest:—

Held, (1.) that the investment was not a real or heritable security; (2.) that it was not a debenture created by a municipal corporation; (3.) that, looking to the previous statement of accounts of the harbour trust, it was not a security a prudent trustee ought to have invested his money in; and (4.) that the annual audit of the ward's accountant of court did not exonerate the curator bonis from liability. HUTTON *v.* ANNAN
H. L. (Sc.) 289

—— Trustees' powers of investment—Deposits with banks—Laws of Victoria - 763
See PRIVY COUNCIL APPEALS. 24.

USER—Identification of trade name with goods by—Injunction - - - 239
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VALUATION OF LANDS (SCOTLAND)—Covenant by tenant to keep free from all expenses whatever—Tramway - 631
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VESTRY—Sewer made without approval of—Liability to repair - - - 190
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WAGON—Liability for defective wagons while in use by another railway company 216
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WALL—Boundary wall—Mutual gable—Half cost of erection - - - 420
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WAY—Power of railway company to grant right of—Access over land taken - 256
See LANDS CLAUSES ACTS.

WIFE—Marital coercion—New Zealand Criminal Code - - - - - 234
See PRIVY COUNCIL APPEALS. 20.

WILL—*General Charge of Legacies on Real Estate if Personal Estate insufficient—Subsequent Specific Devise—Presumption of Law rebutted by Intention.*

A testator bequeathed pecuniary legacies to be charged in the first place upon his personalty, and if the same should be insufficient to be charged upon his real and personal estates. He then specifically devised lands at A. to G. and other lands at other places (naming them) to F. There was no residuary devise. The lands at A. and the lands specifically devised to F. formed the whole of the testator's realty. The personalty being insufficient the pecuniary legatees claimed a charge upon the lands at A.:—

Held, that upon the true construction of the will the testator's intention was that the lands at A. should be charged with the legacies, and that the presumption of law contra was therefore rebutted.

The decision of the Court of Appeal in Ireland, [1897] 1 I. R. 86, affirmed. BANK OF IRELAND *v.* MCCARTHY - - - H. L. (I.) 181

2. —— *Hotchpot Clause — Construction of Will.*

A father having one son and one daughter covenanted with the trustees of his son's marriage settlement that his executors would pay them 10,000*l.* to be held on trust for the son for life, with remainder for the son's wife for life, with remainder as to the capital for the issue of the marriage; in the event (which happened) of there being no child the capital to be held in trust for the father absolutely. The father died having by his will given the residue of his estate in trust for his son and daughter in equal shares. The will provided that all sums which the testator had covenanted to give to or with any child on his or her marriage should, in default of any direction to the contrary, be taken in or towards satisfaction of the respective share of such child, and should be brought into hotchpot and accounted for accordingly. After the father's death his executors paid 10,000*l.* out of his estate to the trustees of the son's settlement, appropriated a like sum to the daughter, and divided the residue equally between the son and the daughter. The son having afterwards died leaving a wife and without issue, the daughter claimed a moiety of the 10,000*l.* fund:—

Held, (1.) that the benefits secured for the testator's son, his wife and children, under the testator's covenant in the son's marriage settlement were sums which the testator had covenanted to give to his son on his marriage, within the meaning of that expression in the hotchpot clause; (2.) that the whole beneficial interest in the 10,000*l.* fund must be treated as appropriated to the son's share at the date of the division of the estate, the ultimate interest being appropriated and allotted to the son under the direction for the equal division of the testator's estate between his two children, and the prior interests being brought into account as part of the son's share under the hotchpot clause; and that the son's executors were therefore entitled to the whole of the 10,000*l.* fund, subject to the life interest of the son's widow.

The decision of the Court of Appeal, *In re De Cosier, Humphreys* v. *Gadsden*, [1897] 1 Ch. 325, affirmed. WHEELER *v.* HUMPHREYS
H. L. (E.) 506

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—— "Invented word" - - - 571
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—— "Pattern" - - - - 499
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—— "Road" - - - - - 256
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WORDS—*continued.*
—— "Succession" - - - - 769
See PRIVY COUNCIL APPEALS. 23.
—— "Use" - - - - - - 442
See PRIVY COUNCIL APPEALS. 19.
WORKMAN—Maliciously inducing employer to discharge servant — Interference with trade - - - - 1
See ACTION.
WRIT—Service of writ out of jurisdiction—Contract - - - - 524
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